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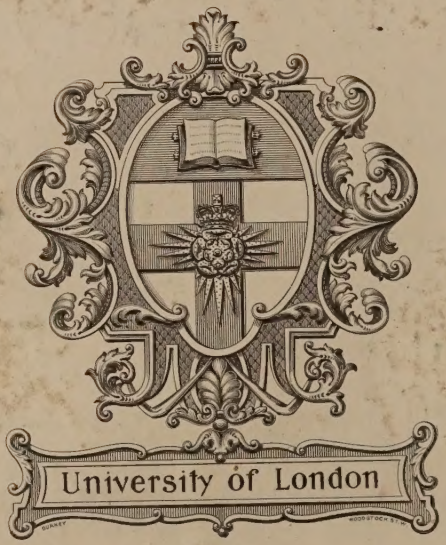

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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1905.

[IN THE COURT OF APPEAL.]

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Feb. 2, 3, 6;
April 3.

LYLES *v.* SOUTHEND-ON-SEA CORPORATION.

Public Authorities' Protection—Limitation of Time for bringing Action—Tramway worked by Municipal Authority—Injury to Passenger—Action for Damages—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

A municipal corporation constructed and worked an electric tramway under the authority conferred on them by an Order made by the Light Railway Commissioners, in pursuance of the Light Railways Act, 1896, and confirmed by the Board of Trade, and having therefore, by s. 10 of that Act, the force of a statute. On the construction of the Order the Court held that it imposed on the corporation an obligation, after the tramway had been opened for traffic, to run cars and to carry passengers in them.

A passenger on one of the cars, who had paid his fare and had taken a ticket in the ordinary form, without any special conditions, was while travelling injured by the fracture of the conducting-rod, which fell upon him. He brought an action against the corporation for damages, alleging

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that the accident had happened through the negligence of the defendants or their servants:—

Held, that the action was in substance founded on a breach by the defendants of their duty as a public authority under their Light Railways Order; that they were entitled to the protection given by the Public Authorities Protection Act, 1893; and that, as the action had not been brought within six months from the happening of the injury, it must fail.

Decision of Bigham J. affirmed.

The Ydun, [1899] P. 236, and *Parker* v. *London County Council*, [1904] 2 K. B. 501, followed.

APPEAL by the plaintiff from a decision of Bigham J.

The question was whether the defendants were entitled to the benefit of s. 1 of the Public Authorities Protection Act, 1893, so that the action could not be maintained because it was not brought within six months from the act or default which gave rise to the action.

The defendants were a municipal corporation, and they were in their corporate capacity the owners of the Southend-on-Sea Electric Tramways. These tramways were vested in the defendants and were constructed and worked by them by virtue of the provisions of the Southend-on-Sea and District Light Railways Order, 1899.

The writ was issued on March 31, 1903.

The statement of claim alleged that on August 9, 1902, the plaintiff became a passenger by the defendants' tramways for reward to the defendants and travelled from Leigh to Southend outside one of the defendants' cars. The plaintiff paid his fare and took a ticket in the ordinary form, without any special conditions. While the plaintiff was so travelling the conducting-rod, which reached from the roof of the car to the electric wire overhead, broke, and a part of the rod fell and struck the plaintiff, whereby he was severely injured.

The plaintiff alleged that the accident was caused through the negligence of the defendants, their agents or servants, and claimed damages.

The defendants by their defence said that the breaking of the rod occurred without any negligence or wrongful act on their part or on the part of their agents or servants. But the defendants said alternatively that, if the injury to the plaintiff

was caused through the act, neglect, or default of the defendants, or their agents or servants, "the same was done in pursuance or execution or intended execution of the provisions contained in the said provisional order and of the defendants' public duty and authority by virtue of which the defendants were working such tramways, and that the present claim is barred by reason of s. 1 of the Public Authorities Protection Act, 1893."

On the argument of the point of law thus raised Bigham J. held that the action could not be maintained because it was not commenced within six months from the occurrence of the accident. The learned judge held that the case was governed by the decisions in *The Ydun* (1) and *Parker* v. *London County Council.* (2)

The Southend Order of 1899 was made by the Light Railway Commissioners, under the powers conferred on them by the Light Railways Act, 1896 (59 & 60 Vict. c. 48), and afterwards confirmed by the Board of Trade.

By s. 10 of that Act "the Board of Trade may confirm the order with or without modifications as the case may require, and an order so confirmed shall have effect as if enacted by Parliament."

The Southend Order of 1899 contained (inter alia) the following clauses:—

"9. Notwithstanding anything in this order contained the corporation shall not acquire or be deemed to acquire thereunder any right other than that of user of any road along or across which they lay the railway."

"47. The railways may be used for the purpose of conveying passengers, goods, minerals, parcels and animals.

"48. The corporation, or their lessees, shall at all times after the opening of the railway or any portion thereof for public traffic provide such service of cars as may be reasonably required in the public interests, and the corporation, or their lessees, shall be liable to a penalty not exceeding five pounds for every day on which they fail to comply with the provisions of this section. Any question which may arise as to the

(1) [1899] P. 236. (2) [1904] 2 K. B. 501.

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service of cars required in the public interests may be determined on the application of the corporation or of the local authority or other body or person by the Board of Trade, whose decision shall be final and conclusive."

"53. The corporation or any company or person using the railway or any portion thereof under the authority of this order may with the consent of the Board of Trade but subject to the provisions of this order enter into agreements with any company or person with respect to the receiving from or forwarding to any such company or person any passengers, animals, goods, minerals, or parcels and the fixing, collection and apportionment of tolls, charges or other receipts arising in respect of such traffic."

"60. The corporation may demand and take in respect of the railway rates and charges not exceeding the sums hereinafter specified subject and according to the regulations in that behalf herein contained.

"61. Subject to the provisions of this order the corporation may demand and take for every passenger travelling upon the railway or any portion thereof including every expense incidental to such conveyance any rates or charges not exceeding one penny per mile, and in computing the said rates and charges the fraction of a mile shall be deemed a mile. A list of all rates and charges authorized to be taken for passengers shall be exhibited in a conspicuous place inside and outside each of the carriages used upon the railway."

"65. The corporation, or their lessees, at all times after the opening of the railway or any portion thereof for public traffic shall run at least one carriage each way every morning in the week and every evening in the week (Sundays, Christmas Day and Good Friday excepted) at such hours not being later than seven in the morning or earlier than half-past five in the evening respectively as the corporation think most convenient for artisans, mechanics and daily labourers at fares not exceeding one halfpenny per mile (the corporation nevertheless not being required to take any fare less than a penny): Provided that in case of any complaint made to the Board of Trade of the hours appointed by the corporation for the running of such

carriages the said Board shall have power to fix and regulate the same."

"74. When the railways have in accordance with this order been completed the corporation may at any time with the consent of the Board of Trade in manner provided by and subject to the provisions of the Tramways Act, 1870, with respect to a lease by a local authority demise to any person, persons, corporation or company (in this order referred to as 'lessees') the right of user by the lessees of the railways or any portion thereof and of demanding and taking in respect of the same the tolls and charges authorized by this order."

"86. Any deficiency of income from the undertaking to meet the expenses thereof in any year shall be payable out of the borough fund by an increase of the first borough rate made after the deficit is ascertained."

"92. The corporation shall be answerable for all accidents, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages, and shall save harmless all road and other authorities, companies or bodies, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages and injuries."

S. T. Evans, K.C., and *Bromley Eames*, for the plaintiff. It is contended that the limitation of time within which an action must be brought against a public authority, as provided by s. 1 of the Public Authorities Protection Act, 1893 (1), does not apply in the present case—

(1) The Act is intituled "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

By s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect" (inter alia):—

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or

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(1.) Because the action is brought against the defendants in the character of carriers long after the completion of the light railway works;

(2.) Because the action is for damages for breach of contract, and it is submitted that the limitation of time applies only to actions of tort. Bigham J., however, held that this is really an action of tort.

(1.) In *Ambler* v. *Bradford Corporation* (1) it was held that the privilege with regard to costs granted by s. 1 of the Act of 1893 extended to a municipal corporation acting under the powers conferred on it by a provisional electric lighting order, duly confirmed by statute. There the action was brought for damage alleged to have been caused to the plaintiff's premises by reason of sluices which the defendants had erected in a stream.

In that case, and also in *Fielding* v. *Morley Corporation* (2), it was held that s. 1 of the Act of 1893, so far as regards the provision as to costs, does not apply to appeals or interlocutory applications, but that it applies to the costs of the judgment. In the latter case the action was brought to restrain the defendants, who had statutory powers to construct an aqueduct across the plaintiff's land, from allowing the water which passed along the aqueduct to overflow on to his land. There is a distinction between the duty to supply water and the carrying of passengers after a light railway is completed.

In the present case Bigham J. followed the decision of Channell J. in *Parker* v. *London County Council* (3); so that the present appeal is really against the decision of Channell J. That learned judge thought that the case was governed by *The Ydun* (4), but it is submitted that that case is distinguishable. There the action was by the owners of a ship against a port and harbour authority for damages sustained by the grounding of the ship through the negligence of the defendants

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default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs as between solicitor and client."

(1) [1902] 2 Ch. 585.
(2) [1899] 1 Ch. 1.
(3) [1904] 2 K. B. 501.
(4) [1899] P. 236.

in inviting her to come up when there was not sufficient water in the channel leading to the docks.

In *Palmer* v. *Grand Junction Ry. Co.* (1) and *Carpue* v. *London, Brighton and South Coast Ry. Co.* (2) the words of the statutes in question were as wide as those of the Act of 1893, and yet a distinction was taken between acts done by the company *in pursuance of* statutory powers, and acts done by them as carriers *in consequence of* those powers. In order that the limitation of time may apply, it is not sufficient that the defendants should be a public body or a municipality; the act which is the cause of action must have been done by them in the interest of the public under their statutory powers. Such bodies have duties to the public outside any statutory powers. Every railway company must act under statutory powers.

[STIRLING L.J. You say that the act to which the protection applies must be done, not only in pursuance of the statute, but also in pursuance of a public duty imposed by the statute?]

Yes. The duty of carrying a passenger safely is not imposed by Parliament; it arises out of a contract with the passenger.

(2.) It is contended that the protection applies only to actions of tort, and that this action is for breach of contract: *Milford Docks Co.* v. *Milford Haven Urban District Council* (3); *Clarke* v. *Lewisham District Council* (4); *Sharpington* v. *Fulham Guardians* (5); *National Telephone Co.* v. *Kingston-upon-Hull Corporation* (6); *Davies* v. *Swansea Corporation.* (7) As to the form of pleading in such an action, see Bullen and Leake's Precedents of Pleadings, 3rd ed. p. 284.

C. A. Russell, K.C., and *C. Herbert Smith*, for the defendants. Though the defendants were not compelled to construct the light railway, yet, when it was constructed, they were under an absolute obligation to provide a reasonable service of cars for the use of the public: clause 48 of the Order. This

(1) (1839) 4 M. & W. 749; 51 R. R. 805.
(2) (1844) 5 Q. B. 747.
(3) (1901) 65 J. P. 483.
(4) (1902) 19 Times L. R. 62.
(5) [1904] 2 Ch. 449.
(6) (1903) 1 L. G. R. 777, 786.
(7) (1853) 8 Ex. 808.

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distinguishes the present case from that of an ordinary railway company. When a passenger enters one of the defendants' cars he is travelling, not by virtue of any contract with the corporation, but in pursuance of a public right given by the Order. In carrying passengers the corporation are discharging a public duty. Railway companies are not common carriers of passengers. The corporation could not carry on the business at all without statutory authority to do so.

If in substance the defendants have been guilty of a tort in the execution of a public duty or in the execution of statutory powers, it is submitted that they are entitled to the protection given by the Act of 1893. If the conducting-rod was not in a proper condition this was a breach of a statutory duty.

It was part of the public duty of the defendants to maintain the plant of this electric tramway in a safe condition so far as reasonable skill and care could make it safe. It appeared that the conducting-rod was in so defective a condition that this must have been discovered with reasonable care. Therefore, the corporation were guilty of default in the execution of their public duty: *The Ydun* (1); *Markey* v. *Tolworth Joint Hospital District Board.* (2)

It is said that when there are two rights, a public right and a private right, the section does not apply. When the defendants have entered into a contract with the plaintiff, if in order to ascertain the rights of the parties it is necessary to consider the terms of the contract, then the matter is to be regarded as a matter of private bargain, and not as a matter of public duty; but except when the terms of the contract have to be looked at, an objection to the defence of the Act will not be upheld. It would make no difference whether the person injured by the defective condition of the rod was a passenger or not. In either case the action would be founded, not on contract, but on tort.

[VAUGHAN WILLIAMS L.J. referred to *Edwards* v. *Vestry of St. Mary, Islington.* (3)]

Taylor v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4),

(1) [1899] P. 236.
(2) [1900] 2 Q. B. 454.
(3) (1898) 22 Q. B. D. 338.
(4) [1895] 1 Q. B. 134.

Kelly v. *Metropolitan Ry. Co.* (1), *Parker* v. *London County Council.* (2) *Palmer* v. *Grand Junction Ry. Co.* (3) and *Carpue* v. *London, Brighton and South Coast Ry. Co.* (4) are distinguishable, because in each of those cases the defendants were a trading company, and not a municipal authority, who are bound to carry passengers. The corporation are bound to provide the service, and that implies the carrying of passengers. This is a default in the management and working of the tramway.

[They also referred to *Davies* v. *Swansea Corporation.* (5)]

Regard must be had to the intention of the defendants. They intended to do these works in the execution of their statutory powers. The case is quite different from that of a trading corporation. In *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (6) and in *The Ydun* (7) the defendants were incorporated for the purpose of earning profits. Power was given to the present defendants to construct a light railway outside their own district. The inhabitants outside the district would have no part of the profits derived from working the railway, and their road is affected by it. The power to construct is given for the benefit of the public. The powers of the defendants, a municipal body, are strictly limited, and they can enter into contracts only so far as they are permitted by the Order—only with the consent of the Board of Trade. In *Palmer* v. *Grand Junction Ry. Co.* (3) and in *Carpue* v. *London, Brighton and South Coast Ry. Co.* (4) the words of the Acts were much wider than those of the present Order.

Clause 47 of the Order does not make the defendants common carriers.

[VAUGHAN WILLIAMS L.J. Are not the defendants liable at common law?]

They are carrying on the railway in pursuance of statutory powers. Clause 92 imposes a liability on them for accidents, damages, and injuries happening through their act or default. Their liability may be the same as that of a common carrier,

(1) [1895] 1 Q. B. 944.
(2) [1904] 2 K. B. 501.
(3) 4 M. & W. 749; 51 R. R. 805.
(4) 5 Q. B. 747.
(5) (1853) 8 Ex. 808.
(6) [1900] 1 Ch. 749.
(7) [1899] P. 236.

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but it is imposed by statute. In *Palmer* v. *Grand Junction Ry. Co.* (1) and *Carpue* v. *London, Brighton and South Coast Ry. Co.* (2) the liability was at common law. In the present case it is statutory, and whatever the corporation do is done in pursuance of the powers given to them by their Act. In *Smith* v. *Shaw* (3) it was held that the giving of directions by a dock master appointed by a dock company established by statute was an act done in pursuance of the Act, and that an action for an injury done to a vessel by reason of improper directions given by the dock master ought to have been brought within the six months limited by the Act.

In the present case the defendants are not the owners of the tramways in the same sense as the companies were the owners of the railways in *Palmer* v. *Grand Junction Ry. Co.* (1) and *Carpue* v. *London, Brighton and South Coast Ry. Co.* (2) Here the duty of the corporation is a public, not a private, duty. In *Palmer* v. *Grand Junction Ry. Co.* (1) Parke B. attached great importance to the fact that the company had elected to become common carriers which their Act did not compel them to be. In the present case the defendants are bound by their Order to carry passengers.

The relation between a passenger and the corporation would entitle him to damages for an injury caused by their negligence apart from any contract between them and him. The plaintiff cannot evade the protection given to the defendants by s. 1 of the Public Authorities Protection Act, 1893, by framing his action in contract upon the same facts which would give rise to an action in tort. If there is a relationship independently of any contract the action is really one of tort: *Kelly* v. *Metropolitan Ry. Co.* (4); *Midland Ry. Co.* v. *Withington Local Board.* (5) *Waterhouse* v. *Keen* (6) is a similar authority.

S. T. Evans, K.C., in reply. It is true that the defendants can do nothing in relation to the tramway except under the authority conferred on them by the Order of 1899; but it does

(1) 4 M. & W. 749; 51 R. R. 805.
(2) 5 Q. B. 747.
(3) (1829) 10 B. & C. 277, 286.
(4) [1895] 1 Q. B. 944, 947.
(5) (1883) 11 Q. B. D. 788, 794.
(6) (1825) 4 B. & C. 200; 40 R. R. 858.

not therefore follow that in everything which they do they are entitled to the protection given by the Act of 1893. If, for instance, they ordered from a tailor the uniform of one of their servants, must the tailor bring an action for the price within six months? The defendants are carriers of passengers and common carriers of goods, and their breach of duty to the plaintiff was a breach of their duty as carriers, not of their public duty under the Order. Their act or omission was not with regard to anything done in pursuance of the Order, and the protection of the Act of 1893 does not apply: *Palmer* v. *Grand Junction Ry. Co.* (1); *Carpue* v. *London, Brighton and South Coast Ry. Co.* (2) *Midland Ry. Co.* v. *Withington Local Board* (3) is really an authority in favour of the plaintiff. In *The Ydun* (4) there was a clear breach of a public duty—a duty imposed by the very terms of the Act. The duty to take care of a passenger is not imposed on the defendants by their Order of 1899. The defendants are empowered by the Order to lease the railway; their lessee, no less than the defendants themselves, would be acting under the Order.

But, even if the protection given by the Act of 1893 extends beyond the construction of the railway, and covers the working, it is submitted that the Act of 1893 applies only to actions of tort, not to actions on contract. *Kelly* v. *Metropolitan Ry. Co.* (5) dealt only with the question of county court costs.

[VAUGHAN WILLIAMS L.J. You cannot deprive the public authority of the protection by waiving the tort.]

The defendants have assumed a distinct capacity in addition to that which the Order gave them, and are liable as carriers: *Austin* v. *Great Western Ry. Co.* (6); *Readhead* v. *Midland Ry. Co.* (7)

Cur. adv. vult.

April 3. The following judgments were read:—

VAUGHAN WILLIAMS L.J. The question in this case is whether the defendants are entitled to rely for defence upon

(1) 4 M. & W. 749; 51 R. R. 805.
(2) 5 Q. B. 747.
(3) 11 Q. B. D. 788.
(4) [1899] P. 236.
(5) [1895] 1 Q. B. 944.
(6) (1867) L. R. 2 Q. B. 442.
(7) (1867) L. R. 2 Q. B. 412; (1869) L. R. 4 Q. B. 379.

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the fact that the action was not commenced within six months next after the neglect complained of.

The action is for damages for personal injuries alleged to have been sustained by the plaintiff when a passenger by the defendants' tramway for reward to the defendants.

The defendants are the corporation of Southend-on-Sea, and by the second paragraph of their defence they plead that, if the injury complained of by the plaintiff was caused through the act, neglect, or default of any of the defendants, or their agents or servants, the same was done in pursuance or execution, or intended execution, of the provisions contained in the Southend-on-Sea and District Light Railways Order, 1899, and of the defendants' public duty and authority by virtue of which the defendants were working the tramway, and that the claim in the action was barred by reason of s. 1 of the Public Authorities Protection Act, 1893.

The issues of fact raised in the action have not been tried, because an order was made on June 9, 1903, that this point of law raised by the defendants in their defence should be set down for hearing and be disposed of forthwith, before the trial of the issues of fact.

The point of law was tried before Bigham J., who decided it in favour of the defendants, and ordered that they should be at liberty to enter final judgment against the plaintiff, with costs. This is the plaintiff's appeal against that order.

The real question raised is whether a neglect or default of the defendant corporation causing injury to a passenger carried for reward by the defendants' tramway is a neglect or default in the execution, or intended execution, of the Southend-on-Sea and District Light Railways Order, 1899, or of any public duty or authority imposed or granted by that Order, which has the force of an Act. It was urged before us that the words of s. 1 of the Public Authorities Protection Act, 1893, are wide enough to give the protection of that section to any person acting in pursuance or execution of any Act of Parliament, and not exclusively to public bodies and officers—that is to say, that according to the natural construction of the words "any person" a tramway company which was a mere trading company, and

owed no duty to the public as a public authority independently of the Light Railways Order, would be entitled to the protection afforded by this Act, in the case of an action brought by a passenger for damages for injuries sustained by him while a passenger through the neglect of those acting in execution of the Light Railways Order, and it was argued that the Public Authorities Protection Act, 1893, ought to be construed in view of the wide application of the word "person," e.g., that the taking of a ticket ought to be held to exclude the operation of the Act. In the first place, I am not sure, having regard to the title of the Act, that the word "person" in this section ought not to receive a limited construction and to be construed as excluding bodies or persons who are mere traders and in no sense public authorities. Secondly, I think that even if the word "person" has the wide meaning suggested, yet the words of the Act ought to receive their natural application, because, even in the case of a railway company or other trading body or trader, the protection of the Act, in my opinion, only applies to duties and acts which the person is under a statutory obligation to perform or do. On the whole, I think that such a limited construction of the word "person" is the true construction.

I will therefore proceed to ask myself the question whether the defendants in taking the plaintiff as a passenger in their tramcar were doing an act in pursuance or execution, or intended execution, of this Light Railways Order, and whether the neglect alleged in the statement of claim was a neglect in the execution of that Order.

Now I do not think that it can have been the intention of the Legislature that every act done by the corporation which was intra vires conferred by this Order should be subject to the protection afforded by this Act. In my judgment an act which is done, not only in pursuance or execution, or intended execution, of this Light Railways Order, but also in pursuance or execution, or intended execution, of some obligation incurred by a public authority voluntarily beyond the obligation cast upon them by the Order, is not an act done in pursuance or execution, or intended execution, of the Order.

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In the first place, I doubt very much whether an act done by virtue of, and in compliance with, an express contract to do that act is done in pursuance or execution, or intended execution, of the Order, merely because the making of the contract itself only became intra vires by reason of the passing of the Order. Indeed, there is express authority to the contrary. Farwell J. in *Sharpington* v. *Fulham Guardians* (1) held that a breach by the guardians of a union of a private contract entered into by them in the performance of their public duties is not "a neglect or default in the execution of any public duty or authority" within the meaning of s. 1 of the Public Authorities Protection Act, 1893. Moreover, in *Midland Ry. Co.* v. *Withington Local Board* (2) Brett M.R. said: "It has been contended that this is an action in contract, and that whenever an action is brought upon a contract the section does not apply. I think that where an action has been brought for something done, or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts." Now it is true that in that case, which was an action brought to recover moneys paid under an improper demand of the local board, the Master of the Rolls held that an action brought to recover that money, as money had and received by the defendants to the use of the plaintiff, although the action in form was an action on an implied contract arising on the waiver of the tort, was not an action for the breach of a contractual obligation so as to exclude the application of the Act giving the protection. And he said that the Court will look at the substance and not at the form of the action; but it does not seem to me that the words of Brett M.R. prevent the exclusion of the application of a statute of that character in a case where the substance of the action is based upon the breach of an implied contract arising out of the existence of a contractual relation, even though the relation may arise by conduct independently of express verbal contract.

This view receives some confirmation from a passage in the judgment of Bowen L.J. in *Edwards* v. *Vestry of St. Mary*,

(1) [1904] 2 Ch. 449. (2) 11 Q. B. D. 788, at p. 794.

Islington (1), where he said: "The action being brought by a servant in respect of an injury done to him by those who had contracted with his master, I think it is difficult to view the action as one brought for breach of any implied contract with respect to supplying the carts."

I will presently consider the question whether the defendant corporation entered into such implied contractual relations with the plaintiff as a private individual as to exclude the protection given to them as a public authority by the Public Authorities Protection Act, 1893. But, before doing so, it is most important to ascertain, in respect of the question whether the breach of duty complained of in this action is a neglect or default in the execution of the Light Railways Order, what is the true meaning of the judgments in *Palmer* v. *Grand Junction Ry. Co.* (2) and *Carpue* v. *London, Brighton and South Coast Ry. Co.* (3), cases which seem to me to have been decided on the same principle. In both these cases the defendants, although they were entitled to a notice of action in any proceeding for any act done or omitted to be done in pursuance of their respective special Acts, were yet held not to be entitled to notice of actions brought against them for negligence as carriers, although the special Acts respectively expressly authorized them so to act.

In both those cases it was held that, although the damages complained of arose from the neglect of the respective defendant companies to carry out specific statutory duties, yet the defendants were not entitled to the protection of notice of action given by their special Acts in the case of things omitted to be done in pursuance of their Acts or in the execution of the powers or authorities given by those Acts, because the actions were brought against the companies for failure in their duties as carriers, and their special Acts did not compel them to become carriers, but merely enabled them to become carriers, if and when they elected to do so.

I can find no substantial difference between the wording of

(1) 22 Q. B. D. 338, 341. (2) 4 M. & W. 749; 51 R. R. 805.
(3) 5 Q. B. 747.

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the sections in those Acts of Parliament which gave the protection of notice of action and the words of the Public Authorities Protection Act, 1893, which give protection by limiting the time within which the action must be brought. I propose, therefore, to examine the provisions of the Southend Light Railways Order, and to compare them with the special Act of the Grand Junction Railway Company, and see whether it would be a true construction of the Southend Light Railways Order to say that it does not compel the corporation to be carriers, or common carriers, but only enables them to be so, so far as they shall see fit.

By the Southend Order, clause 47, it is enacted that the railways may be used for the purpose of conveying passengers, goods, minerals, parcels, and animals. But clause 48 requires the corporation, or their lessees, at all times after the opening of the railway to provide for public traffic such service of cars as may be reasonably required in the public interests, and makes the corporation or their lessees liable to a penalty for default in complying with the provisions of that clause. Moreover, clause 48 seems to make the Board of Trade the final tribunal to determine any question which may arise as to the service required in the public interests. And clause 65 provides for the running every morning and evening (with certain exceptions) of at least one carriage each way for the conveyance of the labouring classes at cheap fares.

These provisions certainly distinguish the position of the Southend Corporation under their Light Railways Order from the position of the Grand Junction Railway Company under their special Act, as to which Parke B. said (1): "The Act does not compel them to be common carriers; it only enables them to be so so far as they shall think fit, and when they have elected to become so they are liable in that character in the same way that other common carriers are. On that ground I think the 214th section does not apply to this case." Of course, in the present case, the Southend Corporation do act as carriers, and it is as carriers that they are sued; but, in my

(1) 4 M. & W. at p. 766; 51 R. R. 805.

opinion, they do not become carriers by election, but by virtue of an obligation specifically cast on them as a public authority by their Light Railways Order. These provisions seem to me to prevent *Palmer* v. *Grand Junction Ry. Co.* (1) from being on all-fours with the present case, because *Palmer* v. *Grand Junction Ry. Co.* (1) was manifestly decided on the ground that the railway company were not compelled by the terms of the special Act to assume the character of carriers, but assumed that character by voluntary election, whereas in the present case we find that, after the opening of the railway, the defendants are compelled by clause 48 to provide such service of cars as may be reasonably required in the public interests, and by clause 65 to run certain carriages at certain times for the labouring classes at cheap fares, and these provisions seem to make it difficult to say that the Light Railways Order does not compel the corporation to assume the character of carriers. On the whole I have come to the conclusion that we ought to hold that the action of the defendant corporation in the carriage of passengers on this light railway is something done in the execution of the Light Railways Order, 1899, as a public authority, although the corporation were under no obligation to apply for or obtain the Light Railways Order or to make or maintain any railway.

In my opinion also the fact that the profits and losses of the railway undertaking go to or are cast on the rates, and that the Light Railways Order has been sanctioned at the instance of the public authority whose duty it is to levy the rates, is itself a legislative recognition of the duty of the public authority in respect of the carriage of passengers and goods on the light railway.

Not only is the corporation who obtained the authority of Parliament for the undertaking a public authority, but the undertaking itself is in no sense a private trading concern. These seem to me to be considerations which are not without their weight when dealing with the question whether the assumption by the corporation of the character of carriers ought to be regarded as something done in the execution of

(1) 4 M. & W. 749; 51 R. R. 805.

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an Act of Parliament, or as something done by the voluntary election of the corporation as to which they owe no duty to the public. Taking as I do the view that the corporation are under a statutory obligation to carry passengers, and are therefore not excluded from the protection of the Act by the principles laid down in *Palmer* v. *Grand Junction Ry. Co.* (1) and *Carpue* v. *London, Brighton and South Coast Ry. Co.* (2), I have still to deal with the argument that what the corporation do, or leave undone, in their character of carriers is not done, or undone, in pursuance of, or in the execution of, the Light Railways Order, or the duties or authorities contained therein. The argument was put in this way. It was said that the duty of the defendants, as carriers, to take reasonable care in the carriage of passengers, or the safe delivery of goods, is a private duty under a private contract, or at all events a private duty towards the passengers carried, or the consignor or consignee of goods, and it was pointed out in connection with this argument that this duty of carriers is nowhere specified or prescribed in the Light Railways Order.

Now it seems clear that there is an implied contract arising on the carriage of passengers or goods, in the former case, as a carrier, to take reasonable care, in the latter case, as a *common* carrier, to make safe delivery in cases in which the loss or accident does not arise from the act of God or the King's enemies, which are the exceptions in favour of carriers, and that, if these implied obligations were embodied in an express contract, the public authority entering into that contract would not be entitled to the protection of the Public Authorities Protection Act, 1893, because the acts of the public authority as carriers would in such a case be done in the execution of a private contract, and not merely in the execution of a public duty.

That this would be so if there was an express contract was decided, and I think rightly, by Farwell J. in *Sharpington* v. *Fulham Guardians* (3), and the decisions in *National Telephone Co.* v. *Kingston-upon-Hull Corporation* (4), *Clarke* v. *Lewisham*

(1) 4 M. & W. 749; 51 R. R. 805.
(2) 5 Q. B. 747.
(3) [1904] 2 Ch. 449.
(4) 1 L. G. R. 777.

District Council (1), *Milford Docks Co.* v. *Milford Haven Urban District Council* (2) are all authorities to the same effect.

Now the question whether the fact that a duty is based upon an implied contract makes it a private duty under a private contract seems, according to the judgment of Brett M.R. in *Midland Ry. Co.* v. *Withington District Local Board* (3), to depend upon whether the breach of the implied contract constitutes in substance, although it may be not in form, a tort.

The case of *Taylor* v. *Manchester, &c., Ry. Co.* (4) seems to shew that, even in a case in which a ticket is issued to the passenger, and the passenger through the negligence of the railway company's servants sustains personal injuries, the cause of action arising would in substance, although it might not in form, be founded upon tort and not upon contract.

If that decision is applicable to a case arising under the Public Authorities Protection Act, 1893, the result would be that the present action must be treated as one in which the real substantial complaint is not for a breach of contract, but for a tort. *Taylor* v. *Manchester, &c., Ry. Co.* (4) was a decision under the County Courts Act, 1888, the question being whether the costs were to be allowed as in an action of contract or as in an action of tort. But I think that decision is applicable to a case in which the question is whether, in regard to the Public Authorities Protection Act, 1893, an action founded on a breach of the duty of the defendants towards a passenger to whom a ticket has been issued is to be regarded as an action for breach of contract or as an action in respect of a tort; and the result is that the present action fails because it was not brought within the six months limited by the Public Authorities Protection Act, 1893.

The result might have been different if the ticket had had upon its face special conditions, and I do not wish to conclude the question of the obligation of a railway company as common carriers even in cases in which there are no special conditions in the receipt given to the consignor.

I have only to add that I do not think the fact that the Light Railways Order enables the corporation to lease the undertaking

(1) 19 Times L. R. 62.
(2) 65 J. P. 483.
(3) 11 Q. B. D. 788.
(4) [1895] 1 Q. B. 134.

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affects the result, for I think that the obligation of the corporation and of their lessees under the Light Railways Order are the same, and that the Public Authorities Protection Act, 1893, only affects the rights of the corporation individually as litigants. The result is that this appeal fails, and the judgment of Bigham J. must be affirmed with costs.

ROMER L.J. I also am of opinion that this case falls within the provisions of the Public Authorities Protection Act, 1893. It is the case of an action against a public authority founded directly and not indirectly on an alleged neglect or default in the execution of a public duty or authority. That being so, it comes within the very words of s. 1 of the Act, and I can see no sufficient reason why it should be excluded from the operation of the Act. The fact that as a matter of pleading the plaintiff's case against the defendant authority might be stated either as one founded on breach of implied contract, or as one founded on tort, does not appear to me to shew that the words of s. 1 of the Act ought not to be held to apply. The question whether the Act does or does not apply to a particular action or proceeding depends upon what is the substance of the action or proceeding. In the present case the substance of the action is damage to the plaintiff by neglect on the part of the defendant public authority in duly performing its public duty or authority of carrying passengers by its tramway. There was no special or particular contract between the defendant authority and the plaintiff in reference to his journey by the tramway in the course of which the accident occurred. The plaintiff was using the tramway as one of the ordinary public, availing himself in the ordinary way of the general obligation cast upon the defendants to work the tramway and to carry passengers by it. This being so, I think the appeal cannot succeed, and, after the full manner in which my Lord has dealt with the authorities cited in argument, I do not think it necessary to discuss them any further.

STIRLING L.J. In my opinion, (1.) the defendant corporation is a "public authority" entitled to the benefit of such

protection as is given by the Public Authorities Protection Act, 1893: *Fielding* v. *Morley Corporation.* (1)

(2.) Clause 48 of the Southend-on-Sea and District Light Railways Order, 1899, imposes on the defendant corporation the duty of carrying passengers on the light railway constructed by them; and the defendant can only obtain relief from the performance of this duty by granting a lease of the railway under clause 74 of the Order, which has not been done.

(3.) The plaintiff's cause of action does not depend on contract, but arises out of a breach of the duty to carry the plaintiff safely cast upon the defendant corporation by the fact of his being taken as a passenger: *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (2); *Austin* v. *Great Western Ry. Co.* (3); *Harris* v. *Perry & Co.* (4)

(4.) That breach of duty is a "neglect or default" in the execution of a public duty within the meaning of s. 1 of the Public Authorities Protection Act, 1893, and within the decision of the Court of Appeal in *The Ydun.* (5) For the reasons given by Vaughan Williams L.J., *Palmer* v. *Grand Junction Ry. Co.* (6) and *Carpue* v. *London, Brighton and South Coast Ry. Co.* (7) do not govern the present case.

The appeal, therefore, fails.

Appeal dismissed.

Solicitors: *H. Ponter; Griffith & Gardiner.*

(1) [1899] 1 Ch. 1.
(2) (1851) 11 C. B. 655.
(3) L. R. 2 Q. B. 442.
(4) [1903] 2 K. B. 219.
(5) [1899] P. 236.
(6) 4 M. & W. 749; 51 R. R. 805.
(7) 5 Q. B. 747.

W. L. C.

1905
April 5.

EAST HAM URBAN DISTRICT COUNCIL, APPELLANTS; AYLETT, RESPONDENT.

Local Government—Street—Expenses of making up—Liability of Frontager—Owner of Premises when Works completed—Change of Ownership between preliminary Notice and Completion—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

When a street has been made up by the local authority under s. 150 of the Public Health Act, 1875, a person who is the owner of premises fronting the street at the date of the completion of the works is liable, under s. 257, to pay an apportioned part of the expenses of the works, although he was not the owner of the premises when the notice requiring the works to be executed was served under s. 150.

CASE stated under the Summary Jurisdiction Acts by two justices of the peace for the county of Essex.

The respondent, Aylett, appeared before the justices at petty sessions to answer an information preferred on behalf of the appellants, the East Ham Urban District Council, under ss. 150, 257 of the Public Health Act, 1875, for the recovery of moneys claimed to be due from him to the appellants in respect of the expenses of making up a street within their district. (1)

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice. . . .

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

Sect. 257: "Where any local autho-

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At the hearing the following material facts were proved or admitted:—

On August 28, 1900, the East Ham Urban District Council caused notices to be served on the owners or occupiers of the premises fronting, adjoining, and abutting on a certain street within their district, which was not a highway repairable by the inhabitants at large, requiring them to make up the street, under s. 150 of the Public Health Act, 1875. A copy of that notice was, on August 28, 1900, served upon one Nichall, as the owner of certain premises in the street, he being then in receipt of the rack-rent of the premises as agent for some person other than Aylett. This notice was addressed to Nichall by name. Aylett was not then the owner or occupier of the premises, and no notice was served upon him.

The notices not having been complied with, the district council executed the required works, which were completed in the month of July, 1901.

Aylett became the owner of the premises in question by purchase on March 27, 1901, and he continued to be owner until June 25, 1902, when he sold the premises.

The expenses of the works were duly apportioned by the surveyor of the district council in July, 1903. Notice of the apportionment, and demand for payment of the sum of 94*l.* apportioned in respect of the premises in question, was served on Aylett on March 10, 1904.

Aylett refused to pay the sum demanded, and the district council thereupon took these proceedings to recover the same.

Aylett contended that he was not liable, because he was not the owner of the premises at the date when the notice to do

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rity have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

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the work was served in 1900; and the district council contended that he was liable because he was the owner at the time when the works were completed. The justices decided in favour of Aylett, and dismissed the information.

The question for the opinion of the Court was whether the justices were justified in dismissing the information.

If the Court should be of the affirmative opinion the dismissal to stand; otherwise the case to be remitted to the justices to be further dealt with.

Macmorran, K.C., and *G. Temple Martin*, for the appellants. By s. 150 of the Public Health Act, 1875, the local authority may recover the expenses of the works from the "owners in default"; and by s. 257 the expenses may be recovered "from any person who is the owner of such premises when the works are completed for which such expenses have been incurred." In *Millard* v. *Balby-with-Hexthorpe Urban District Council* (1) it was held by the Court of Appeal that a person who was the owner of premises when the preliminary notice was served and when the works were completed was liable to pay an apportioned part of the expenses, although he had parted with the premises before the apportionment and demand of payment. The only distinction between that case and the present case is that the respondent here was not the owner when the preliminary notice was served, although he was the owner when the works were completed. It is said for the respondent that he is not "the owner in default" because he was not the owner when the notice to do the work was served. That point was left open in *Millard's Case* (1); but the Master of the Rolls in his judgment clearly expresses the opinion that the person who is owner when the works are completed is in all cases liable whether or not he was owner when the notice was served. It has been decided in several cases that, as between vendor and purchaser of the premises, the person who is the owner when the works are completed is liable: *In re Bettesworth and Richer* (2); *Stock* v. *Meakin* (3); *In re Allen and*

(1) [1905] 1 K. B. 60. (2) (1888) 37 Ch. D. 535.
(3) [1900] 1 Ch. 683.

Driscoll's Contract. (1) In the last-mentioned case the notice was served on the vendor, and it was held that the purchaser was liable because he was the owner when the works were completed.

Symmons, for the respondent. It is true that the charge upon the premises attaches at the date when the works are completed, and that is the ground of the decisions in the cases as between vendor and purchaser. But that is not at all conclusive as to the personal liability. By s. 150 the personal remedy is given against the owner "in default," and that must be the owner upon whom a notice to execute the works has been served and who makes default in complying with the notice. In *Reg.* v. *Swindon Local Board* (2) the decision was that the owner who has been served with the notice is the person who is personally liable; and that decision was not overruled in *Millard's Case* (3), but only a dictum of Cockburn C.J. The provisions of s. 257 do not come into operation except against an owner who is "in default" within the meaning of s. 150. The provision of s. 150 that the personal remedy shall be against the owner "in default" is rendered meaningless if it is held that s. 257 governs the matter and makes the owner at the date of completion alone liable.

Macmorran, K.C., was not called on to reply.

LORD ALVERSTONE C.J. Without saying that the point is exactly covered by the decision in *Millard* v. *Balby-with-Hexthorpe Urban District Council* (3), yet I think that it is absolutely necessary for the respondent to displace the reasoning of the Master of the Rolls in the passage which has been referred to in his judgment in that case. He there said: "Whether on the terms of that section [s. 150] alone the owner making default in doing the works required by the notice would remain permanently liable, although he did not continue to be owner at the time of the completion of the works, it is not necessary to consider. For, when we come to s. 257, we find that in absolutely unambiguous terms it makes

(1) [1904] 2 Ch. 226. (2) (1879) 4 Q. B. D. 305.
(3) [1905] 1 K. B. 60.

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Lord Alverstone C.J.

that person who is owner when the works are completed liable. Whether any other person would also be liable it is not necessary to consider." Those observations must have very great weight with us, unless we can see that they were unnecessary to the judgment because the point was not one which it was necessary for the Master of the Rolls to consider. Looking at s. 257, I only desire to repeat what I have said before, that standing alone it seems to fix the liability on the person who is the owner at the time of the completion of the works. It first refers to "expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act," thereby clearly referring to the person upon whom a notice has been served under s. 150; and then, instead of saying that such expenses may be recovered from that person, it says that "such expenses may be recovered from any person who is the owner of such premises when the works are completed." That section, therefore, contemplates a different state of things and a different time, namely, the time of completion as distinguished from the default to obey the notice under s. 150, and contemplates the possible liability of some person other than the person who has been served with the notice under s. 150 and made default. I quite agree with the argument on behalf of the respondent that, for the purpose of considering the personal liability in summary proceedings under ss. 150 and 257, the cases in equity relating to the charge upon the premises are not necessarily authorities; but I think that *In re Allen and Driscoll's Contract* (1) shews that, for the purpose of ascertaining when the liability arises, the date of the completion of the works is to be taken; because in that case, according to the respondent's argument, the vendor was the person in default, and yet it was held that the expenses fell upon the purchaser who was the owner at the time of the completion of the works. Therefore, in my opinion, both upon the words of s. 257, and upon the principle of those equity cases, and in the face of *Millard's Case* (2), the decision of the justices cannot be supported. The observations of the Master

(1) [1904] 2 Ch. 226. (2) [1905] 1 K. B. 60.

of the Rolls in *Millard's Case* (1) are, in my view, strong authority in favour of the view we take, though possibly the judgment of Stirling L.J. did not go quite so far. Our judgment must, therefore, be for the appellants.

KENNEDY and RIDLEY JJ. concurred.

Judgment for the appellants. Case remitted.

Solicitors for appellants: *Wilson & Son.*
Solicitors for respondent: *Surtees & Surtees.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1905
April 7.

JACKSON, APPELLANT; THE WIMBLEDON URBAN DISTRICT COUNCIL, RESPONDENTS.

Local Government — Drain or Sewer — Drain-pipe draining several Houses belonging to the same Owner—Sewer draining into single Private Drain —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain-pipe receiving the drainage of several houses, the property of one owner, does not cease to be a sewer within the definition in s. 4 of the Public Health Act, 1875, because it is connected with a single private drain, to which s. 19 of the Public Health Acts Amendment Act, 1890, is applicable, and by means of which the drainage of the houses is ultimately conveyed to a public sewer.

Judgment of the Divisional Court, [1904] 2 K. B. 359, affirmed.

APPEAL from the decision of a Divisional Court upon a case stated by justices, reported [1904] 2 K. B. 359.

The appellant was summoned for default in payment of expenses incurred by the respondents as local sanitary authority in relaying certain drains. It appeared that facing a street called Hartfield Crescent there were sixteen houses. Of these houses twelve belonged to the appellant, and of the other four three belonged to another person, and the remaining house belonged to a third person. In Hartfield Crescent there was a public sewer, from which there ran, at right angles through a

(1) [1905] 1 K. B. 60.

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narrow piece of land between two of the houses and not built on, a drain which, at a point in a line with the backs of the houses, connected with a manhole. All the appellant's houses lay to the right of this manhole, and the sewage of those houses was conveyed by means of branch drains into a main or common drain running at the back of the houses, and connected at the manhole with the drain running from it to the public sewer in the road. The sewage of the four houses to the left was conveyed in like manner by branch drains into a common drain, and so to the manhole and the public sewer in the road. Complaint having been made to the respondents as the local authority, they caused the drains to be inspected, and found that the common drain behind the appellant's houses, the common drain behind the other four houses, and the drain from the manhole to the sewer required to be relaid; and notices to that effect were duly given to the owners of the sixteen houses requiring them within a specified time to do the necessary works. No question arose as to the drain behind the four houses, the owners of which complied with the notice. The work required upon the drain from the manhole to the public sewer was executed by the respondents, and the cost apportioned between the owners of the sixteen houses, and no question arose upon the apportionment. The necessary works to the drain at the back of the appellant's houses were executed by the respondents upon the appellant's non-compliance with the notice given to him, and on his refusal to repay to the respondents the sum that they had expended summary proceedings were taken to recover the amount. At the hearing of the summons it was not disputed that the drain between the manhole and the public sewer was a single private drain within the meaning of s. 19 of the Public Health Act, 1890. The contention of the appellant was that the common drain at the back of his twelve houses was a sewer within the meaning of s. 4 of the Public Health Act, 1875 (1),

(1) 38 & 39 Vict. c. 55, s. 4: "'Drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by

and not a single private drain coming under the provisions of s. 19 of the Act of 1890 (1), and that therefore he was not liable to repay the money expended on repairs by the respondents. The justices decided against this contention, and made an order for the payment of the amount claimed.

The appellant appealed, and the Divisional Court (Lord Alverstone C.J., Wills J., and Kennedy J.) allowed the appeal. (2)

The respondents appealed.

Macmorran, K.C. (with him *George Humphreys*), in support of the appeal. The circumstances of this case are a variation of those which existed in *Bradford* v. *Eastbourne Corporation* (3) and *Thompson* v. *Eccles Corporation*. (4) If the main drain which takes the sewage of the appellant's houses had been in a straight line with and in continuance of the drain from the manhole to the sewer it would be impossible to divide the whole conduit into two parts, and as the part communicating directly with the public sewer has been admitted to be a single private drain, it would follow that the whole length would fall under that description. The fact that the appellant's drain is not in a line with the drain from the manhole to the public sewer but at right angles to it cannot make a difference in its character, for the whole system of private drainage of the sixteen houses ought to be considered. From this point of view the appellant is liable to repair the drain belonging to his houses as a single private drain to which s. 19 of the Act of 1890 applies the provisions of

different persons is conveyed. 'Sewer' includes sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies . . . ."

(1) 53 & 54 Vict. c. 59, s. 19: "(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 . . . . and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses . . . ."

"(3.) For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

(2) [1904] 2 K. B. 359.

(3) [1896] 2 Q. B. 205.

(4) [1905] 1 K. B. 110.

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s. 41 of the Act of 1875, and the decision of the Divisional Court to the contrary should be reversed. This case was before the Court a short time ago, and was sent back to the justices for information as to the original construction of the system of drainage and by whom it had been repaired. No light has been thrown upon these matters; but, if the judgment of the Divisional Court is right, a conduit which would be a drain because the houses draining into it belonged to different owners might alter its character and become a sewer when one person bought all the houses. The strange result would follow that a partial change of ownership would transfer the liability to repair from private persons to the local authority.

Sylvain Mayer, for the appellant. The matter must be considered with regard to the existing position of affairs: *Kershaw* v. *Taylor*. (1) That position is that the drain behind the appellant's houses was undoubtedly a sewer, for it does not come within the definition of a drain in s. 4 of the Act of 1875. That being so, nothing has happened to alter its character; for it does not come within the description of a single private drain in s. 19 of the Act of 1890. This particular drain-pipe does not "connect" two or more houses with a public sewer; all that it does is to carry the sewage of certain houses into a single private drain at the manhole. The two lines of pipes are not continuous, but even had they been it has been decided that a conduit for sewage may be in part a sewer and in part a drain: *Beckenham Urban Council* v. *Wood*. (2) [He cited *Heaver* v. *Fulham Borough Council*. (3)]

Macmorran, K.C., in reply. Sect. 19 of the Act of 1890 altered previously existing rights, and was intended to take away to some extent the obligations as to repair from the public authority and to throw them on owners. With that view it dealt solely with the existence of two or more houses belonging to different owners and using a common conduit pipe by which their drainage was carried into a public sewer, as in this case; so that the connection required by s. 19 is established. Once it is found that these houses are connected with a public

(1) [1895] 2 Q. B. 471. (2) (1896) 60 J. P. 490.
(3) [1904] 2 K. B. 383.

sewer by a single private drain the definition of a drain in sub-s. 3, by which the expression "drain" includes a drain used for the drainage of more than one building, is applicable to the whole system.

COLLINS M.R. This is an appeal from the decision of a Divisional Court upon a question arising in relation to the construction of s. 19 of the Public Health Act, 1890. That section has frequently been the subject-matter of discussion, and we have recently in this Court had occasion to deal with it. In *Thompson* v. *Eccles Corporation* (1) this Court followed the decision in *Bradford* v. *Eastbourne Corporation* (2), in which Lord Russell of Killowen C.J., in an elaborate and instructive judgment, dealt with the question of a "single private drain" within the meaning of s. 19 of the Act of 1890; and Wills J. was a party to that decision, as he was to that which we are now called on to review.

The section commences thus: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain," and applies to such a case the provisions of s. 41 of the Public Health Act, 1875, relating to complaints as to nuisances from drains, with the result that the expenses incurred by the public authority in executing works on such a drain are thrown upon the owners. In this case we have what is admitted to be a single private drain connected with a sewer in the street, and running at right angles to it to a manhole near the back line of the houses bordering the street. Upon one side are twelve houses belonging to one owner, who is the appellant in these proceedings. From the manhole there runs a pipe which receives the drainage of these twelve houses. On the other side of the manhole there are four houses, three of which are owned by one person, and the fourth, that nearest to the manhole, is owned by another person, and the drainage of those houses is led to the manhole, and so into the drain which connects with the sewer in the street.

The main contention of the district council is that, by reason

(1) [1905] 1 K. B. 110. (2) [1896] 2 Q. B. 205.

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Collins M.R.

of the fact that in a portion of its course all the sewage of the houses on either side of the manhole traverses what is admittedly a single private drain, the case is brought within the words of the section, because there is a connection with a public sewer, by a single private drain, of two or more houses belonging to different owners. They say that all the houses on both sides of the manhole are in the last resort connected by a single private drain with a public sewer. It seems to me that the short answer to that suggestion is given in the decision in *Bradford* v. *Eastbourne Corporation* (1) and in the judgment in the Court below in this case, that the part of the system of drainage to which the provisions of s. 41 of the Act of 1875 are applied by s. 19 of the Act of 1890 must itself be a single private drain. The place to be repaired cannot be brought within the definition of a single private drain merely by reason that sewage which is carried along it passes at some other part of its course through what can be properly called a single private drain. If the place to be repaired is not itself a single private drain, the section does not put upon the owner the obligation to repair.

Applying that to this case, the houses on the right of the manhole are the property of one owner only. By the law as it stood before the Public Health Act, 1890, the pipe which drained those twelve houses was a sewer, and s. 19 of that Act does not take it out of that category unless it could be shewn that it connects with a public sewer the drainage of houses belonging to different owners. As I have pointed out, the work that is required must be work on a single private drain, and except at such a place the statute does not apply. The Lord Chief Justice and Wills J. in their judgments in the Divisional Court followed up the course of the sewage from the houses to the public sewer, and held that although it passed at one part of its course through a single private drain, that fact did not change the nature of the conduit at other points. I agree with those judgments, which are in conformity with the decisions in *Bradford* v. *Eastbourne Corporation* (1) and *Thompson* v. *Eccles Corporation*. (2) This case was argued before us a

(1) [1896] 2 Q. B. 205. (2) [1905] 1 K. B. 110.

short time ago, and was sent back to have it determined whether the twelve houses, now the property of the appellant, had, as it was suggested, belonged at some time to different owners. No evidence upon this point has resulted from sending the case back, and I do not think it is necessary to consider what effect would have followed if that suggestion had been established, and moreover the onus would lie on those who set up that contention to establish the fact if they wished to found any argument upon it. We have to deal with this case on the fact before us that the twelve houses are now in one ownership; and I have come to the conclusion, for the reasons that I have given, that the judgment of the Divisional Court must be upheld, and this appeal must be dismissed.

STIRLING L.J. I am of the same opinion for the reasons given by my Lord and in the judgments of the Divisional Court.

MATHEW L.J. I am of the same opinion. The argument for the district council is that, assuming that the pipe which carries the drainage of the twelve houses belonging to the plaintiff was a sewer before the passing of the Act of 1890, its nature has been changed because its drainage passes into what is admittedly a single private drain. I cannot find in the Act an intention to make such a change. Turning to the facts, it is plain that this was a sewer, because it carried the drainage of a number of houses belonging to one owner. Had there been several owners the case would have been different; but, as the matter stands, the Act does not apply, and the conduit is a sewer in point of law, though in fact it is a drain.

Appeal dismissed.

Solicitors for appellant: *W. W. Young, Son & Ward.*

Solicitors for respondents: *Sharpe, Parker & Co., for R. H. S. Butterworth, Wimbledon.*

A. M.

1905
April 10, 11.

WINCANTON RURAL DISTRICT COUNCIL *v.* PARSONS.

Local Government—Sewer or Drain—Notice to abate Nuisance—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 94, 95.

The defendant had for some years discharged the sewage from his house into a pipe running alongside a country road, which pipe had been laid down by an adjoining owner for his own protection for the purpose of carrying off the surface water from the highway and so preventing it from flowing on to his premises. No water other than the rain water from the highway and the sewage from the defendant's house passed along the pipe. It had never been repaired by the local authority or treated by them as a sewer. A breakage having occurred in the pipe it became stopped up, and the defendant's sewage collecting above the stoppage caused a nuisance. The local authority took proceedings against the defendant under s. 94 of the Public Health Act, 1875, for the purpose of compelling him, as "the person by whose act, default, or sufferance the nuisance arose," to abate it:—

Held, (1.) That it was no defence for the defendant upon those proceedings to shew that the pipe was a sewer which the local authority were liable to repair. (2.) That under the circumstances it was not a sewer.

CASE stated by justices of the county of Somerset.

The respondent was summoned at the instance of the appellants upon a complaint under s. 95 of the Public Health Act, 1875, which charged that on July 8, 1904, there existed a nuisance at the Manor Farm, in the parish of Charlton Horethorne, arising from a drain being defective and broken; that the appellants, being satisfied that the nuisance was caused by the act or default of the respondent, served on him a notice requiring him to abate it, and that he had made default in complying with that notice.

At the hearing the following facts were proved or admitted. The drain in question was laid and covered over in a ditch alongside the premises of the respondent known as the Manor House, and between them and a highway under the control of the appellants for a distance of 250 feet, where it discharged into a catch-pit, and thence continued for 70 feet under the highway to a point where it was joined by a drain from

another house, after which it passed through some private premises known as the Kennels, and finally discharged into a stream. Down to the catch-pit the drain was used only for the drainage of the respondent's house and stables, and from the catch-pit to the point of junction with the second drain it was used also for carrying off the surface water from the highway. The part of the drain above the catch-pit was made by the owner or tenant of the Manor House within the last fifteen years. The catch-pit and the portion of the drain between it and the point of junction with the second drain had been made some years previously by the tenant of the Kennels for the purpose of preventing the surface water from the highway flowing into his premises. Neither the drain nor the catch-pit had ever been repaired by the appellants. The portion of the drain leading from the catch-pit had from some cause unknown become broken where it passed under the highway at a distance of about six feet from the catch-pit. This breakage prevented the sewage from flowing from the catch-pit, where it collected and caused the nuisance complained of. It was contended by the respondent that the drain at the point of breakage was a sewer which the appellants as the local authority were liable to repair. The justices dismissed the complaint subject to a case for the opinion of the Court.

R. Cunningham Glen, for the appellants. It is immaterial to consider whether this pipe at the point where the nuisance occurred was a drain or sewer. For the purpose of these proceedings under ss. 94, 95, the only question for the justices was whether the respondent was the person by whose act the nuisance arose. The question whether the appellants were liable to repair the pipe, and whether the respondent would have any remedy over against them, is nothing to the point. That is a matter which would have to be determined in subsequent proceedings. The person by whose act the sewage is discharged is the person who causes the nuisance: *Brown* v. *Bussell*. (1) Secondly, this is not a sewer at all. The definition of "drain" and "sewer" in s. 4 has reference only to

(1) (1868) L. R. 3 Q. B. 251.

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pipes which respectively carry the drainage of one or more buildings. Having regard to that definition, it was held in *Silles* v. *Fulham Borough Council* (1), under the corresponding definition section in the Metropolis Management Act, 1855, that a drain used for the drainage of rain water from one house and sewage from another is a sewer. But a drain which, as here, carries the sewage of one house and the rain water from a highway, as distinguished from a building, does not come within the definition of a sewer and stands on a different footing. There is also a further reason why this drain should not be held to be a sewer. There can be no sewer without a lawful outfall. A drain which ends in a cesspool cannot be a sewer: *Meader* v. *West Cowes Local Board* (2); *Button* v. *Tottenham Urban District Council* (3); *Butt* v. *Snow*. (4) And here there could not be a lawful outfall, for the drain ended in a stream, and by s. 17 of the Public Health Act, 1875, the draining of sewage into a stream is absolutely prohibited. Thirdly, even if the drain was a sewer for the purpose of carrying rain water, that did not entitle the respondent to discharge sewage into it: *Kinson Pottery Co.* v. *Poole Corporation*. (5)

Vaughan Williams, for the respondent. This was a sewer. A drain is defined by s. 4 to mean a "drain of and used for the drainage of one building only." This pipe is not within that definition, for it drains the surface of the highway as well. Then if this is not a drain it must be a sewer, for "sewer" is defined to mean every kind of drain except drains as above defined. That the water from the road was clean water is immaterial. It is not necessary to constitute "drainage" within the definition clause that the water should be foul: *Silles* v. *Fulham Borough Council* (1); *Durrant* v. *Branksome Urban District Council*. (6) The test of whether a pipe is a sewer or a drain is not the quality of the liquid which it is used to carry, but whether the liquid comes from one source or more. If it comes from more than one source it is a sewer,

(1) [1903] 1 K. B. 829.
(2) [1892] 3 Ch. 18.
(3) (1898) 78 L. T. 470.
(4) (1903) 89 L. T. 302.
(5) [1899] 2 Q. B. 41.
(6) [1897] 2 Ch. 291.

whether those sources be houses or not. Then if the pipe here was a sewer the respondent had a right under s. 21 to discharge sewage into it. A pipe cannot be a sewer for one purpose unless it be also a sewer for all purposes: per Vaughan Williams L.J. in *Wilkinson* v. *Llandaff, &c., Rural Council* (1), where he says that if *Kinson Pottery Co.* v. *Poole Corporation* (2) was intended to decide the contrary he did not agree with it. When once it is established that a particular pipe is a sewer, the duty lies on the local authority to keep it in repair under s. 15. And they cannot evade that obligation by taking proceedings under ss. 94, 95 against the persons who discharge their sewage into it: *Fordom* v. *Parsons* (3), following the Irish case of *Molloy* v. *Gray* (4); the reason being, as pointed out by Palles C.B. in the latter case, that "although in such a case the act (of causing the sewage to flow into the sewer) must be considered the act of the party, still if that act is authorized by the Legislature, and done in the mode contemplated by the Legislature, it is not illegal, and consequently not the subject of action or prosecution." A man cannot be lawfully charged as for a nuisance in respect of an act which he has a statutory right to commit.

R. C. Glen, in reply. Vaughan Williams L.J. in *Wilkinson* v. *Llandaff, &c., Rural Council* (1), in saying that a drain cannot be a sewer for some purposes of the Act and not for others, meant nothing more than that the local authority could not escape the obligation of cleansing a channel so that it should not be a nuisance when once it was shewn to be a sewer. He did not mean that the purpose of a sewer could not be limited to the carrying of rain water only.

KENNEDY J. In this case I think the appellants ought to succeed. The complaint was preferred under s. 95 of the Public Health Act, 1875, against the respondent, who is the occupier of a house in the parish of Charlton Horethorne known as the Manor House, for non-compliance with a notice under s. 94 requiring him, as the person by whose act or default

(1) [1903] 2 Ch. 695.
(2) [1899] 2 Q. B. 41.
(3) [1894] 2 Q. B. 780.
(4) (1889) 24 L. R. (Ir.) 258.

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Kennedy J.

a certain nuisance arose, to abate it. The nuisance in question arose from the overflow of sewage matter from a catch-pit. It is not disputed that the sewage matter came from the Manor House alone, and the respondent could at any moment by ceasing to discharge his sewage into the pipe leading to the catch-pit stop the nuisance. It may be that if there had not been a breakage in the pipe immediately below the catch-pit there would have been no nuisance, and it was contended that the duty of repairing the pipe was on the appellants, and that as they omitted to repair it it was their default and not the act of the respondent from which the nuisance arose. With that contention I cannot agree. If the respondent hereafter could make out that the pipe was a sewer, and that it was consequently the duty of the appellants to repair it, that might enable him to recover from them any expenses which he might have incurred in complying with the abatement notice, but could afford, I think, no answer to proceedings under s. 95 for non-compliance with the notice. If in such proceedings the local authority bonâ fide dispute their obligation to repair, the justices cannot inquire into the question upon whom the obligation lies, and, if satisfied that but for the defendant's discharge of sewage into the pipe the nuisance would not have arisen, are bound, I think, to deal with him as the person by whose act the nuisance was caused. But, further, I do not think the respondent could establish the existence of a duty in the appellants to repair this pipe, for I do not think it was a sewer. The pipe in question was not made by the appellants, nor was it adopted by them as a sewer. It was made by private persons for private purposes, to prevent surface water collecting on the highway from running thence on to their premises. And under those circumstances the mere fact that the respondent has for some years discharged the sewage from his house into this pipe cannot convert it into a sewer.

RIDLEY J. I agree that the respondent, being the only person who discharged any sewage into this pipe, was for the purposes of these proceedings the person by whose act the nuisance arose. I also agree in thinking that this pipe was

not a sewer at all. But even if it was a sewer, it was not a sewer into which sewage could lawfully be discharged, for within the distance of a very few yards it was connected with a natural stream, and to allow it to be so connected if used for the conveyance of sewage would be in contravention of s. 17 of the Public Health Act. The case of *Kinson Pottery Co.* v. *Poole Corporation* (1) is a strong authority against the respondent's contention. Indeed, the present is an a fortiori case. There the surface-water drain was constructed by the local authority themselves, not, as here, by private persons; there there were twelve houses discharging foul water into the drain, not merely a single house as here; and yet it was held that though the drain might be a sewer for the purposes of carrying rain water, it was not a sewer into which foul water could be properly discharged, and the owners of the houses so discharging it were liable to proceedings under ss. 94, 95. Darling J. there said: "I agree that for certain purposes the surface-water drain was a sewer, but it is contended that therefore the appellants have a right to turn into it any refuse they please, and then it is for those who own the sewer to deal with the state of things so caused. In my opinion that is not the law." And Channell J. expressed himself to the same effect. With regard to the case of *Wilkinson* v. *Llandaff, &c., Rural Council* (2), I may observe that all that that case decided was that a surface-water drain which received the rain water from a number of houses on the side of a highway was a sewer, which the local authority were bound under s. 19 to keep so as not to be a nuisance or injurious to health. The dictum at the end of the judgment of Vaughan Williams L.J. to the effect that a drain cannot be "a 'sewer' for some of the purposes of the Act and not a 'sewer' for other purposes" means, as I read it, nothing more than this—that when once a drain is shewn to be a sewer, the local authority are subject in respect of it to all the statutory obligations attaching to them as owners of sewers, including the obligations under s. 19; but I cannot think that the Lord Justice meant to say that a pipe could not be a sewer for the purpose of carrying clean water

(1) [1899] 2 Q. B. 41. (2) [1903] 2 Ch. 695.

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without also being a sewer for the purpose of carrying foul. His judgment does not, in my opinion, in any way conflict with the decision in *Kinson Pottery Co.* v. *Poole Corporation.* (1)

Judgment for the appellants.

Solicitor for appellants: *J. Trevor Davies.*
Solicitors for respondent: *Robins, Hay & Co.*

J. F. C.

C. A.

1905

April 4.

[IN THE COURT OF APPEAL.]

THE KING ON THE PROSECUTION OF ROBERTS AND OTHERS *v.* DODDS AND OTHERS, LICENSING JUSTICES OF BIRKENHEAD.

Licensing Acts—Licence — Renewal of On Licence — Conditions attached to Renewal—Licensing Justices—Right to require Reasonable Undertaking—Refusal to deliver Licence without Undertaking—Mandamus—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 9.

The justices of a licensing district have no authority, under s. 9 of the Licensing Act, 1904, to make the renewal of an existing on-licence conditional on the applicant giving an undertaking as to the conduct and management of the business, in respect of matters not covered by the grounds for refusing the renewal of such a licence specified in s. 1 of the Act.

APPEAL from a judgment of a Divisional Court discharging two rules nisi for mandamuses.

The prosecutors were one Roberts, the tenant, and Messrs. Walker & Son, the owners, of certain licensed premises called the Commercial Hotel, within the borough of Birkenhead. The former applied at the general annual licensing meeting for the borough for a renewal of the on-licence of the premises, when it was stated by the chairman that the licensing committee would ask all persons applying for the renewal of on-licences to give a certain undertaking, on the renewal of their licences, that the applications for renewal would be adjourned, and that notices of the required undertaking would be served on the

(1) [1899] 2 Q. B. 41.

registered owners of the premises. Notices were accordingly served on Messrs. Walker & Son stating that licensed persons would be required to give upon application for renewal an undertaking to observe certain conditions. The conditions were as follows: (1.) No intoxicating liquor shall be used or supplied upon credit. (2.) No intoxicating liquor shall be supplied to any child under the age of fourteen years. (3.) No games, draws, or raffles shall be suffered to take place upon the licensed premises (except billiards in alehouses). (4.) The licensee shall devote the whole of his time to the business of this licence. (5.) The back door of the premises shall be kept locked except for domestic purposes. (6.) No clubs for the purpose of a distribution of drink at Christmastide or any other period shall be permitted at the premises.

At the adjourned meeting of the licensing committee the owners of the Commercial Hotel and the owners (with one exception) of all the other licensed houses in Birkenhead refused to assent to the licensees of their respective houses giving the required undertaking. The chairman thereupon stated that all the licences would be renewed, but would remain in the hands of the clerk to the licensing justices to be delivered over to the licensees upon their giving to him an undertaking to carry out the conditions which were printed on the back of each licence. The meeting was then further adjourned. At the subsequent meeting application was made to the committee to adopt the course of refusing the licences, so that appeals could be taken to quarter sessions and the right of the committee to require the undertakings might be tested. The committee declined to take that course, and the chairman stated that the renewals were not refused, and that the licences could be obtained on giving the required undertakings. The tenant of the Commercial Hotel subsequently applied to the clerk for his licence, but in consequence of his refusal to give the undertaking he could not obtain it.

A rule nisi was applied for in the King's Bench Division by the tenant and the owners of the Commercial Hotel and granted by the Court for a mandamus calling upon the licensing justices to shew cause why a writ of mandamus should not issue

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commanding them to deliver over to Roberts his renewal licence. At the same time a rule nisi was also applied for and granted for a mandamus to the justices to shew cause why they should not hold an adjourned meeting to hear and determine according to law the application of Roberts for a renewal of his licence.

The justices shewed cause against these rules, which on argument were discharged by the Divisional Court (Lord Alverstone C.J., Wills J. and Kennedy J.).

The prosecutors appealed.

March 30. *Pickford, K.C.* (with him *Rigby Swift*), for the tenant. The course taken by the justices in this case is not one which by the Licensing Acts they were entitled to take. They had no power to require the licence-holder, as a condition of renewing his licence, to give an undertaking as to the matters that were printed on the back of the licence. They professed to grant the renewal, but they directed their clerk not to issue the renewed licence unless the undertakings indorsed thereon were given. Either they must be taken to have refused to hear and determine the application for a renewal according to law, or they must be taken to have renewed the licence, in which case they are bound to issue it. Under the Licensing Act, 1904, s. 1, sub-s. 1, the licensing justices can only refuse to renew an existing on-licence on certain grounds, namely, that the licensed premises have been ill-conducted, or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void; the power of refusing the renewal on all other grounds is transferred to the quarter sessions, who are, however, only to exercise it on a reference from the licensing justices, and on payment of compensation in accordance with the Act. A refusal to give such undertakings as were required in the present case is not one of the grounds specified in the Licensing Act, 1904, s. 1, sub-s. 1. Before the passing of that Act there was no power given to the justices to impose conditions on renewing an on-licence, except in two special cases, namely, those provided for by s. 49 of the Licensing Act, 1872, and s. 7 of the Licensing

Act, 1874, under which the applicant for the licence might himself apply for the insertion of a condition as to closing on Sunday or early closing. When the renewal of a licence was a matter of discretion with the licensing justices, a practice grew up for the justices to require undertakings from the licensee as a term of renewing the licence; and s. 9, sub-s. 2, of the Licensing Act, 1904, in view of that practice provides that a breach of any reasonable undertaking so voluntarily given by the licensee may be regarded as shewing that the premises had been ill-conducted; but it cannot be construed as empowering the justices to require such undertakings as were required to be given in this case as a condition of renewing the licence, and there is no power to do so given by any of the Licensing Acts. The effect of the view taken by the Divisional Court is really to nullify the provisions of s. 1, sub-s. 1, of the Licensing Act, 1904. Reliance was placed by the Divisional Court on the proviso to s. 9 of the Act as indicating that the justices may require such undertakings to be given, but the object of that proviso was to enable the owner of the premises to be heard in cases where the licensee is prepared voluntarily to give an undertaking. In imposing the conditions printed on the back of these licences the justices have departed from the statutory form, and this they have no power to do.

A. H. Bodkin (with him *F. E. Smith*), for the owners of the premises, in support of the appeal. One of the conditions imposed by the justices relates to the sale of intoxicating liquors to children. That is a matter which is dealt with under the Intoxicating Liquors (Sale to Children) Act, 1901, which imposes conditions as to the sale to children. The justices have contravened that statute by imposing a general prohibition not warranted by its provisions. The Licensing Act, 1904, contains no recognition of any power in the justices to impose the conditions that were in vogue before the passing of the Act, and gives the justices no right to depart from the statutory form of licence, as they have done by inserting in the licence the following clause: "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions indorsed on the back hereof."

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Asquith, K.C., and *Low, K.C.* (*S. T. Little* with them), for the justices. On the question of procedure, the right course for the appellants to have taken was to appeal to quarter sessions. Whether the action of the justices was a refusal to grant a licence or the grant of a conditional licence it is equally an act done against which an appeal under s. 27 of the Alehouse Act, 1828, could be brought by a person aggrieved, that section not being repealed by the Licensing Act, 1872, so far as relates to the renewal of licences. There being another remedy, that by mandamus is not open to the prosecutors: *Reg.* v. *Smith.* (1)

The conditions printed on the licences do not amount to an alteration of the statutory form, nor are they to be treated as a code applicable to every case. If they were unreasonable in any case and a modification were refused, that would be matter for appeal. With regard to the condition as to sale to children, the imposing of reasonable conditions cannot properly be described as a contravention of the Act.

Upon the point of construction the argument of the other side gives no intelligible meaning to s. 9, sub-s. 2, of the Act of 1904. The sub-section in mentioning "any reasonable undertaking" obviously referred to the practice which had grown up of requiring undertakings, and it was intended to regulate and sanction them. The Legislature were no doubt taking away the unlimited jurisdiction of the licensing justices and confining that jurisdiction primarily to the grounds mentioned in s. 1; but if a reasonable undertaking is given and not fulfilled the default brings the case within the authority to refuse where premises have been ill-conducted. The proviso throws light upon the previous part of sub-s. 2, for it speaks of "the required undertaking," notice of which is to be served on the owner to give him an opportunity of being heard. The right to demand an undertaking is a separate right arising under s. 9; but what can be a greater test of the "fitness," under s. 1, of the holder of a licence than his refusal to give an undertaking which it is not contested is reasonable? The Court of quarter sessions have no power to impose con-

(1) (1873) L. R. 8 Q. B. 146.

ditions, and they must either renew the licence, or refuse the renewal subject to the payment of compensation. That is applicable to every case in which the licensing justices are of opinion that the question of renewal requires consideration on grounds other than those on which they can themselves refuse the renewal. If the large number of cases of which the present is a sample cannot be dealt with by the licensing justices, it would take years before sufficient funds could be provided for compensation, and in the meanwhile the licensees would go on unfettered by any condition. The construction placed on the statute by the Divisional Court avoids this unreasonable state of things. Conditions altogether outside the scope of the licence have been held to be void: *Rex* v. *Athay* (1); *Reg.* v. *Wilkinson* (2); *Reg.* v. *Bowman* (3); but there is no case in which conditions of the kind now before the Court have been objected to.

[They referred to *Reg.* v. *County Council of West Riding of Yorkshire.* (4)]

Pickford, K.C., in reply.

Cur. adv. vult.

April 4. COLLINS M.R. read the following judgment:—The question on this appeal is whether, although the Licensing Act, 1904, s. 1, has expressly limited the power to refuse the renewal of an existing on-licence to five named grounds, it is nevertheless competent to the justices of the licensing district to refuse it unless the applicant consents to give an undertaking to keep and observe certain conditions to be indorsed on the back of the licence as to the conduct and management of the business, and not covered by the five grounds named. The Divisional Court has decided that it is. A technical question arises also—namely, whether, even if the justices were wrong, the appellants ought not to have appealed to quarter sessions instead of proceeding as they have done by motion for a mandamus. The Court below has decided the case upon the merits, and both sides are anxious that it should, if possible, not be determined on merely technical grounds.

(1) (1758) 2 Burr. 653.
(2) (1864) 28 J. P. 597.
(3) [1898] 1 Q. B. 663.
(4) [1896] 2 Q. B. 386.

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I will address myself therefore to the main question above stated.

The circumstances under which the Act of 1904 came to be passed are well known. The House of Lords had finally decided in *Sharp* v. *Wakefield* (1) that the discretion of justices was absolute in refusing renewals except in the case of licences falling within the Act of 1869 and in existence on May 1 of that year. The discretion was of course to be exercised judicially "according to the rules of reason and justice, not according to private opinion, according to law, and not humour": see the judgment of Lord Halsbury in that case. After that decision renewals were more frequently refused on grounds of general policy, and not by reason of defects in the premises or of misconduct of the licensee. The Farnham case, decided in 1902, *Rex* v. *Howard* (2), was much discussed, and legislation was called for to mitigate the hardship of individuals whose means of livelihood had been lost by the withdrawal of licences for the benefit of the community without misconduct on their part. This led to proposals of compensation, which were adopted and embodied in the Act of 1904. In order to discriminate between those who on a general reduction of licences might be deemed fairly entitled to compensation and those who might not, it was necessary to ascertain the grounds upon which the justices in any particular case had acted in refusing a renewal. It was apparently thought by the Legislature that the simplest way of working out this result was to take away the unlimited discretion of justices and substitute a limited discretion based on defined grounds, which were no doubt those by which the justices had in practice guided themselves. Hence the provisions of s. 1 controlling the discretion and obliging the justices to specify in writing the grounds of their refusal. A practice had also grown up, known to all persons conversant with licensing procedure, for the justices, having the general discretion I have referred to, to demand from applicants undertakings as to the conduct and management of the business if the licence were renewed. We were told that such undertakings were

(1) [1891] A. C. 173. (2) [1902] 2 K. B. 363.

sometimes asked for and given even in cases of licences under the Act of 1869, which had existed at the date of the passing of that Act. This brief anticipatory statement is necessary in order to appreciate the bearing of the sections and the precise point raised for decision.

Sect. 1 of the Licensing Act, 1904, enacts as follows: "(1.) The power to refuse the renewal of an existing on licence, on any ground other than the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. In every case of the refusal of the renewal of an existing on licence by the justices of a licensing district, they shall specify in writing to the applicant the grounds of their refusal. (2.) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard and, subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates." Sect. 2 deals with the amount of compensation. Sect. 3 provides for a compensation fund. Sect. 4 deals with new licences and the attaching of conditions thereto. Sects. 5 to 8 deal with machinery. Then comes s. 9, which, coupled

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with s. 1, raises the point for decision. It enacts as follows: "(1.) The provisions of this Act shall apply to the transfer of an existing on licence as they apply to the renewal of an existing on licence, with the substitution of transfer for renewal. (2.) If the justices of a licensing district refuse to renew an existing on licence on the ground that the holder of the licence has persistently and unreasonably refused to supply suitable refreshment (other than intoxicating liquor) at a reasonable price, or on the ground that the holder of the licence has failed to fulfil any reasonable undertaking given to the justices on the grant or renewal of the licence, the justices shall be deemed to have refused the licence on the ground that the premises had been ill-conducted: Provided that where the justices, on an application for the renewal of an existing on licence, ask the licence-holder to give an undertaking as aforesaid, they shall adjourn the hearing of the application and cause notice of the required undertaking to be served upon the registered owner of the premises and give him an opportunity of being heard." Sub-ss. 1 and 2 create no difficulty. The latter merely makes it clear that the two classes of acts named therein may be treated by justices as falling within one of the grounds of refusal limited by the 1st section of the Act. It is upon the proviso to sub-s. 2 that the decision of the Court below is based. It is upon the words "required undertaking" that the learned judges mainly, if not wholly, found themselves. If these words may be fairly read as merely a synonym for the undertaking which the justices are supposed to have "asked for" in the earlier part of the sentence, the whole fabric of implication based on the use of the word "required" falls to the ground. Unless it is to be read as equivalent to "insisted upon as a condition of renewal," it cannot ground the inference drawn from it, that the Legislature assumed the existence of a power to require in that sense an undertaking, as surviving the inhibition of the 1st section, with the result that it must be taken to have sanctioned an additional ground for the refusal of a licence as arising upon a failure to give an undertaking. In other words, we must first construe "required" in a sense not necessarily demanded by the context, and then infer that

it was intended by the use of that word to repeal or modify the express and unambiguous enactment of the 1st section, and vest in the licensing justices another ground of refusal, although the power to refuse except on the five grounds named has been expressly withdrawn from them and vested in the quarter sessions. Surely a bold inference to draw from such slight materials. Down to this point in the discussion there can, it seems to me, be no possible doubt as to the effect of the enactment. The intention to limit the discretion to refuse a renewal to the grounds named in s. 1 is clear beyond controversy. "The power to refuse the renewal of an existing on licence on any ground other than" the five named "shall be vested in quarter sessions instead of the justices of the licensing district"; and to withhold a renewal unless the applicant will give an undertaking as to the mode of carrying on the business is, in my judgment, the same thing as to refuse it on a ground other than one of the five. A fortiori when the undertaking relates to matters outside the five grounds. This provision is express and absolute, and leaves nothing to implication, and yet it is contended that, notwithstanding this clear and peremptory inhibition in the governing enactment, it is to be read as not meaning what it says, but as covering and permitting a refusal on a ground not falling within any of those named, but the right to act on which is to be implied out of a proviso to a sub-section which is addressed, by way of greater caution apparently, to providing that a particular line of conduct may be deemed misconduct within the governing enactment. In my judgment it is not competent for this Court to introduce, by implication only, a provision directly contradictory of an unambiguous enactment addressed to the very point itself. If we are at large to draw inferences and make implications, why are we to leave out the inference arising from the fact that the Legislature has not only abstained from enacting this sixth ground of refusal, but has by the limitation to five other grounds directly excluded it? And why are we to suppose that it intended that the refusal to give an undertaking should be a ground of refusal of the renewal, when, its attention being obviously called to the existing

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practice as to undertakings, it addresses its enactment expressly to the breach of such undertakings when given, and not to the refusal to give them at all? The proviso, as I have pointed out, does not in its context purport to relate at all to the 1st section, and surely, if there is any apparent inconsistency between the two, it is the scope of the proviso which must be limited so as to make it harmonize with the primary and unambiguous inhibition of the 1st section. To contradict the plain language of the Act by a surmise based on such materials is, in my judgment, to substitute legislation for interpretation. But it cannot be contended that the proviso is altogether nugatory if it be held not to add another ground of refusal to those named in the 1st section. We learn that such undertakings were sometimes given in cases under the Act of 1869, though it is clear that the justices had no power to refuse the renewal except upon the four grounds named in that Act, and it may be that others hereafter may do what one of the applicants has done in this instance—voluntarily give the undertaking asked for. Though the Court below have arrived at the conclusion that the justices were acting within their powers in refusing renewals in the cases under appeal, I am nevertheless entitled to pray in aid of my own opinion their decision in *Rex* v. *Grimwade*, a case of a licence in existence before May, 1869, and governed by the Act of that year. (1) They have

(1) This case was argued at the same time as the one under consideration, and arose out of an application for the renewal of a licence to a house, in respect of which a licence to consume beer either on or off the premises was in existence before May 1, 1869, and had been continuously renewed. The licensing justices, upon the application being made, required that the tenant should give an undertaking that no intoxicating liquor should be supplied to any customer, unless such liquor should be paid for at the time of delivery. A rule nisi was obtained by the tenant for a mandamus to the justices to issue the renewed licence to him without requiring him to enter into the undertaking. The justices did not appear, but they filed an affidavit in which they stated that they had not refused to grant the renewal of the licence, and that they considered that the undertaking which, under the powers given them by the Licensing Act, 1904, they required the tenant to give was a reasonable one. The Divisional Court made the rule absolute on the ground that the provisions of s. 8 of the Wine and Beerhouse Act, 1869, were expressly kept alive by s. 9, sub-s. 3, of the Licensing Act, 1904, and that there was nothing in that Act which added to the jurisdiction of the justices under the former Act.

held that in those cases the justices had no power to exact the undertaking, presumably because to do so was to refuse upon a ground other than the four named in that statute: see *Rex* v. *Grimwade*. Now, by sub-s. 3 of s. 9 of the Act of 1904, the grounds mentioned in s. 8 of the Act of 1869 are substituted for the grounds mentioned in the present Act as the grounds on which the power to refuse the renewal of an existing licence is reserved to the justices of the licensing district. On what grounds the Court can have held that the justices had no power to refuse the renewals in those cases which do not equally apply to the cases under review I am, with deference, at a loss to determine. The words of s. 8 of the Act of 1869 are no more clear and peremptory than those of s. 1 of this Act, and the practice as to asking undertakings from applicants under the former Act existed, as we were told by Mr. Low, in some places. The words of the redoubtable proviso do not purport to be limited to one class of licences more than another. They are—"where the justices, on an application for the renewal of an existing on licence, ask the holder to give an undertaking." Why is this provision to be limited to licences other than those existing in May, 1869, and regulated by the Act of that year? If it does apply to them, and no reason has been given why it does not, then the Court below, on their decision, must read the word "required," on which they rest the whole weight of their conclusion in the cases now under discussion, in two different senses according as to whether the licence is one governed by the conditions of s. 8 of the Act of 1869 or not—in the former class in the sense contended for by the appellants, namely, as a synonym for "asked for"; in the latter in the sense which they have adopted as governing their decision in the cases now under appeal, namely, "stipulated for as a condition of allowing the renewal." While cordially agreeing with the decision of the Court below in the cases under the Act of 1869, I must, with great deference, express my inability to adopt their conclusion in the cases which are the subject of this appeal.

With regard to the technical point, I think that the true effect of what the justices did was that they did not refuse the

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renewals in such a form as to admit of an appeal to quarter sessions. In fact, when asked to give a positive refusal so as to facilitate an appeal, they declined to do so, and insisted that they had allowed renewal. What they, in fact, had done was to cause licences to be printed containing on their face a variation from the statutory form by the introduction of the following words: "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions indorsed on the back hereof"; and on the back were indorsed six conditions. These licences were deposited with their clerk, to be delivered to the applicants on their giving the undertakings. Not having, in their view, refused the renewals, they did not specify in writing to the applicant the grounds of their refusal. Nevertheless, it is now contended on their behalf that the applicant was bound to treat what they had done as a refusal to renew, and to have appealed if he objected, and that the remedy by mandamus was therefore not open. It seems to me that, if I am right in the construction I have placed upon the statute, what the justices have done is to decide in favour of renewal with a condition which they had no power to impose and which is therefore nugatory, and that a mandamus ought to go to compel them to deliver the renewal licences without the condition. If their decision cannot be so treated, then I think the result is that they have not decided the point submitted to them at all, and that a mandamus should go, as in *Reg.* v. *Bowman* (1) and *Reg.* v. *Cotham.* (2) In my opinion, therefore, the appeal must be allowed.

MATHEW L.J. read the following judgment:—In these cases I differ, I need not say with much hesitation, from the opinions of my learned colleagues. I think the judgments of the Divisional Court were right and ought to be affirmed. The statute which we are called on to construe is entitled "An Act to amend the Licensing Acts, 1828 to 1902, in respect to the extinction of licences and the grant of new licences," and by s. 10 the Act is to be construed as one with the Licensing Acts

(1) [1898] 1 Q. B. 663. (2) [1898] 1 Q. B. 802.

aforesaid. Before the statute in question the right of appeal to quarter sessions was granted to all persons aggrieved by any act of any justices done in or concerning the exercise of their powers. Where there was a refusal to grant the renewal of a licence, the decision of the licensing justices might be reviewed by quarter sessions, and subject to this their discretion was absolute. For many years this practice had been followed all over England of granting a renewal of a licence upon an undertaking to observe certain conditions intended to secure the orderly and proper management of licensed houses. Each applicant was required to satisfy the magistrates either by verbal or written assurances that the conditions which they required would be complied with. If any objection were made to the act of the justices in this respect, it seems clear that there would be an appeal to quarter sessions. When the Act of 1904 was passed, the licences then in existence were for the most part of this limited character. The undertaking which was required in this case was admitted to be of the usual character and to be perfectly reasonable. This is shewn by the statements which counsel were instructed to make to the justices. For many years the conditions had been accepted and assented to by those interested in licensed premises in Birkenhead. The question upon this appeal is whether the procedure which had been previously adopted, of granting a renewal of a licence upon conditions, had (under the Act of 1904) been placed beyond the jurisdiction of the justices. This was said to be a necessary implication from the language of the statute. Under s. 1 the absolute discretion previously conferred upon the justices was confined to the cases therein specified, and in respect of the decision of the justices in those cases there would be for persons aggrieved an appeal to quarter sessions. Refusal to renew in cases other than those specified in s. 1 was vested in quarter sessions instead of the justices of the licensing district. No provision is made for a direct application in such cases to quarter sessions. By sub-s. 2, where the justices came to the conclusion that the renewal of any particular licence required consideration they were to refer the matter, together with their report thereon, to quarter sessions,

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and that Court was, as appears from the rules (1), to have the power either to continue the licence or to cancel it subject to the payment of compensation as provided by the Act. They appear to have no further powers. This enactment only applies when there has been no default on the part of the applicant, and the only question is whether the licence should be continued or withdrawn. It has no application to cases where the renewal is granted on the undertaking to fulfil conditions. There is no ground for any implication so far that the authority of the licensing justices to impose conditions was in any way affected. That there was no distrust of the discretion of the justices is shewn in s. 4, where they are empowered to attach to the grant of a new licence such conditions as they think proper in the interests of the public. Further, under s. 9, sub-s. 2, where an applicant agrees to the condition, the justices may, upon giving an opportunity of being heard to the registered owner, grant the renewal in the exercise of their discretion, and may disregard any objections the owner may offer. But then it is said the language of sub-s. 2 shews that the discretion of the justices can no longer be exercised when the holder of the licence objects to any conditions and refuses to enter into any undertaking. The enactment, it is argued, only applies where there has been a consent to a condition, and where there has been no consent there can be no condition or undertaking. It is said that, as the applicant refused to give an undertaking, the justices had no power to refuse the licence on any ground. But I see no reason why the enactment should receive this interpretation. The section in terms applies only where consent has been given. It is intended to provide a mode of punishment where an undertaking has not been fulfilled. It has no reference to the question of the terms upon which a renewal may be granted. But it is said that the proper inference from the language of the section is that consent is optional; in other words, that there should be added by implication to the section a proviso that an applicant should not be compellable to consent to a condition, however reasonable it may be. But,

(1) Licensing Rules, 1904.

in the first place, under the second clause of s. 9, sub-s. 2, the authority of the justices to require an undertaking seems to be taken for granted. In the next place, this construction would have the effect of nullifying the section. No applicant would consent to an interference with the conduct of his business, particularly where the breach of an undertaking might jeopardize his licence. Further, the control which has hitherto been exercised by the justices would be completely swept away. This condition of things would, no doubt, be an advantage to publicans, but it would be secured at the expense of the interests of the community in each locality. Without clear language I do not think that there should be attributed to the Legislature the intention to sanction so formidable, and, if I may be permitted to hazard the opinion, so lamentable a revolution in the mode which has hitherto been adopted in administering the Licensing Acts. There is no apparent reason for the supposed change. With respect to what took place before the licensing justices, the evidence appears to me to be quite clear. If there were any doubt, it is removed by the subsequent correspondence. The justices declined to say that they refused the applications, for the reason that they were willing to grant them if their conditions were complied with. They were quite right in declining to give any effect to the hollow assurances offered on behalf of the trade that the publicans in the locality were anxious to do what the justices thought right. The sure test of their willingness was that they should give the undertaking required of them. I desire to express no opinion upon the decision of the Divisional Court as to beerhouses. There has been no appeal from their judgment in this respect.

COZENS-HARDY L.J. read the following judgment:—This appeal raises an important and difficult question as to the powers of licensing justices under the recent Act of 1904. The Birkenhead justices, acting in perfect good faith and with the sole desire to promote the welfare and order of the borough, desire to exact from all applicants for the renewal of on-licences certain undertakings, which I assume to be

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reasonable. The licences are in the usual form, except that the following clause is inserted: "This renewal licence is granted upon the licensee giving an undertaking to keep and observe the conditions indorsed on the back hereof." Six conditions are indorsed, but it is not contended that all those conditions should be exacted in the case of every house. The justices deny that they have refused the licences; on the contrary, they assert that they have renewed the licences, although the clerk has been directed not to hand them out unless and until the undertakings are given. The licence-holders decline to give any undertaking. The Divisional Court have held that the justices may require a reasonable undertaking to be given as a condition of granting a renewal; and the main point in this appeal is whether that view is correct. Prior to January 1, 1905, justices had a general discretion to grant or refuse renewals of licences of the class with which this appeal alone deals: *Sharp* v. *Wakefield* (1); and a practice very naturally grew up by which the justices made terms with the licence-holders, and insisted, as a condition of renewal, that certain undertakings should be given. These undertaking were sometimes indorsed on the licence, sometimes entered in the clerk's book, and sometimes were verbal. I cannot doubt that this was a most wholesome practice. The undertakings were given because without them the licence would not have been renewed. The undertakings were observed because a wilful breach would have almost certainly been a fatal objection when the next application for renewal came before the justices. But, except in the manner and to the extent above indicated, these undertakings were voluntary and had no sanction. They are not mentioned in any of the licensing statutes. A great change was effected by the Licensing Act, 1904, in the position of licensing justices. By s. 1 the power to refuse renewal on any ground other than one of five particular grounds is taken away from the licensing justices and is vested in quarter sessions, and quarter sessions can only act on a reference from the justices and on payment of compensation. The only one of the five grounds on which the justices may refuse a renewal which need be referred to is

(1) [1891] A. C. 173.

"that the licensed premises have been ill-conducted." It is, however, contended that, notwithstanding the plain language of this sub-section, there is to be found in s. 9, sub-s. 2, an implied power in the justices to refuse renewal unless reasonable undertakings are given, or, which amounts to the same thing, to grant renewal only upon such undertakings being given. I cannot adopt this contention. It really involves the addition of a sixth ground on which the justices may refuse. The first paragraph of the sub-section lends no support to the contention. It is fully satisfied by regarding the undertaking as one which is not exacted, but volunteered. And although the second paragraph of the sub-section contains the words "the required undertaking," I think the context shews that "required" is merely equivalent to asked for or requested. The judges in the Divisional Court seem to have thought that the construction which I have adopted renders s. 9, sub-s. 2, perfectly useless, because no license-holder would be so foolish as to volunteer an undertaking the non-fulfilment of which might entail the refusal of renewal without possibility of compensation. With the utmost respect, I am unable to concur in this view. Although the general discretion upon which the former practice of undertakings rested is gone, it is easy to see that it may still be greatly to the interest of the licence-holder to give a reasonable undertaking. For example, the justices may ask for a reasonable undertaking which they think ought to be given, and may say that if it is not given they will refer the matter to quarter sessions, under s. 1, sub-s. 2, with a view to the refusal of renewal. The licence-holder will be very desirous not to run the risk of having the renewal refused by the quarter sessions. A refusal means to him the loss of his occupation and trade, and it will be a poor consolation to him to know that compensation will be payable "to the persons interested in the licensed premises"—see s. 2, sub-ss. 1 and 2—for the fraction attributable to his interest will in most cases be very small. Nor does it appear unreasonable that the registered owner of the licensed premises should have an opportunity of being heard before a voluntary undertaking is given, inasmuch as the giving of such an undertaking may result in the refusal

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of the licence and the loss of the compensation, the greater part of which would go to the owner. And, further, it is perfectly reasonable that the breach of an undertaking voluntarily given, after notice to the registered owner, should be held to amount to ill-conduct, so as to bring the case within the jurisdiction of the justices under sect. 1. In my opinion, the old practice of exacting undertakings on renewals of on-licences cannot survive the destruction of the general discretionary power to grant or to refuse, to which the existence of the practice was due. It is not for us to legislate; our duty is limited to interpretation. In my opinion, the introduction in the licence of the undertaking, which is not found in the form prescribed by the Secretary of State under s. 48 of the Licensing Act, 1872, was not authorized. I agree with the judgment of the Master of the Rolls on this point.

It is, however, contended by the respondents that, even if the justices were wrong in their view of the law, the appellants ought to have appealed to quarter sessions under s. 27 of the Alehouse Act, 1828, and that the remedy by mandamus is not available. I think this objection would be valid if the justices had refused, on wrong grounds, to grant renewal: *Reg.* v. *Smith.* (1) But they did not refuse. They attempted to attach a condition or impose a term which was not authorized, and in such a case the remedy by mandamus is appropriate: *Reg.* v. *Bowman.* (2) I think the proper order is that a mandamus should issue to the justices commanding them to deliver up to the applicants their renewed licences in the proper statutory form, without exacting any undertaking.

Appeal allowed.

Solicitors for prosecutors: *Godden, Son & Holme, for Thompson, Hughes & Mathison, Birkenhead.*

Solicitors for defendants: *Lloyd-George, Roberts & Co., for Gerrard Copeland, Birkenhead.*

(1) L. R. 8 Q. B. 146. (2) [1898] 1 Q. B. 663.

A. M.

THE KING *v.* JOHNSON AND OTHERS.

1905
April 11.

Licensing Acts—Exemption from Closing—Jurisdiction of Justices—Certiorari —Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 26.

An order of justices under s. 26 of the Licensing Act, 1872, extending the hours during which a licensed house may be kept open for the sale of intoxicating liquors, is a judicial order, and may be brought up on certiorari.

CERTIORARI to bring up certain orders of justices for the Upton-on-Severn Petty Sessional Division of the county of Worcester.

In September, 1874, the licensing committee of the county of Worcester made an order, under s. 32 of the Licensing Act, 1874, by which the rural town of Upton-on-Severn was made a "populous place," and this order continued in force down to 1902, having been renewed without alteration after each census, namely, in 1883 and in 1894. In 1902 the licensing committee caused notices to be issued to all licence-holders and local authorities of the various places in the county in respect of which orders were then in force creating "populous places" that they proposed to revoke the orders in force, and would hear evidence in support of applications for fresh orders. In April, 1903, application was made for a fresh order declaring a certain area within the town of Upton-on-Severn to be a populous place. This area had a population of 1436 persons. The committee refused the application. Subsequently in June, 1904, applications were made to the justices for the petty sessional division of Upton-on-Severn on behalf of the various licence-holders of the town for orders under s. 26 of the Licensing Act, 1872 (1), authorizing an hour's extension of the time during

(1) By s. 26 of the Licensing Act, 1872, "The local authority of any licensing district, upon the production of such evidence as such authority may deem sufficient to shew that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling, ... may

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which licensed houses in the Town Ward of Upton might be kept open for the sale of intoxicating liquors. Orders were made granting these applications in respect of twelve out of the fourteen licensed houses in the town. These orders were all in the same form, and only differed in that they related to different licensed premises, and the descriptions of the persons following the lawful trades or callings therein mentioned were slightly varied.

In the case of the Lion Hotel the order was in the following terms: "We, the undersigned justices of the peace usually sitting at the petty sessions for the petty sessional division of Upton-on-Severn, within which the premises, the Lion Hotel, hereinafter mentioned are situated, and having heard evidence to shew that it is necessary and desirable so to do for the accommodation of a considerable number of persons following the lawful trade or calling of farmers, tradesmen, fruit and pea dealers, market-gardeners in the immediate neighbourhood of the said premises, and being satisfied that it is so necessary and desirable as aforesaid, and that the said premises are in the immediate neighbourhood of such lawful trade and calling aforesaid, do hereby consent to the grant and do grant an order exempting Isaac Randell Budden, of the Lion Hotel, Upton-on-Severn, being a person duly licensed to sell intoxicating liquors at the said Lion Hotel, from the provisions of the Licensing Acts, 1872–1902, with respect to the closing of the said premises

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grant, if such authority think fit, to any licensed victualler or licensed keeper of a refreshment house in respect of premises in the immediate neighbourhood of such market, or of the place where the persons follow such lawful trade or calling, ... an order exempting such person from the provisions of this Act, with respect to the closing of his premises on such days and during such time, except between the hours of one and two of the clock in the morning, as may be specified in such order. . . .

"The following persons and bodies of persons shall be deemed to be local authorities of licensing districts for the purposes of this Act; that is to say—(1.) In the metropolitan police district, the commissioner of police for the metropolis. . . . (2.) In the City of London and the liberties thereof, so far as they are not included in the metropolitan police district, the commissioner of city police. . . . (3.) In any other place, two justices of the peace in petty sessions assembled."

between the hours of 10 and 11 o'clock at night from the date hereof until the 30th September, 1904.

"Given under our hands this 16th day of June, 1904.

"Chas. C. Johnson.

"R. S. Bagnall."

Each publican separately gave evidence as to the particular house that he occupied, and stated his reasons for asking for the extension of time. The general reasons given were that there was a depreciation of their trade as publicans owing to the houses closing at 10 P.M. instead of 11 P.M. as formerly, and that agricultural labourers, bargemen, market-gardeners, shopmen, tradesmen, and travellers generally, could not get away from their various occupations until 10 P.M., and were thus debarred from obtaining reasonable refreshment unless the houses were kept open until 11 P.M.

The town of Upton is a small rural town, the total population of which in 1901 was 2225. It has no staple industry. The tradesmen rely on the surrounding agricultural district for their support. There is no market-gardening in the town itself, nor do the farmers live close to the town. Though Upton once had a market, it does not now possess one. There is no trade in the place which requires its followers to keep late hours. A rule was obtained by Samuel Thornely, the clerk of the peace for the county of Worcester, for a certiorari to bring up all the said orders before the High Court to be quashed.

Amphlett, K.C., and *R. W. Coventry*, for the respondent justices, shewed cause. The justices were entitled to make the orders which they did. They find the existence of all the facts necessary to give them jurisdiction under s. 26. But even if they were wrong in making the orders, certiorari will not lie for the purpose of bringing them up to be quashed. Certiorari will only lie to bring up a judicial order, and the justices in making them were not acting judicially. In *Boulter* v. *Kent Justices* (1) it was held that justices at a licensing meeting are not a Court, and that a grant or refusal by them of a licence is not an "order." And accordingly in *Reg.* v. *Sharman* (2)

(1) [1897] A. C. 556.

(2) [1898] 1 Q. B. 578.

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Wright J. held that a refusal by the justices at a licensing meeting to hear, in opposition to an application for a licence, an objector who refused to be sworn was not an order which could be brought up on certiorari. That decision was followed in *Reg.* v. *Cotham* (1), although no doubt in that case Wills J., while admitting himself bound by it, expressed some doubt as to whether he should have arrived at the same conclusion himself. Then if the case of *Reg.* v. *Sharman* (2) is to be regarded as binding on this Court, the present case is undistinguishable in principle from it. No valid distinction can be drawn between the grant of a licence to sell liquors during the ordinary hours and the grant of a licence to sell them during the extended hour. In *Reg.* v. *Manchester Justices* (3) it was held that certiorari would lie to bring up the order of a confirming authority under the Licensing Acts; but the ground of that decision was that, whereas before the licensing committee even if the licence be objected to there is no litigation inter partes, it is otherwise before the confirming authority, the latter tribunal having power to award costs against an unsuccessful objector. And that decision was followed in *Rex* v. *Sunderland Justices.* (4) But those cases are distinguishable, for there was here no power to give costs under s. 26 against an unsuccessful objector, had there been one. There could be no litigation inter partes upon an application under that section, however strenuously it might be opposed. It is true that Vaughan Williams L.J. in the last-named case expressed a doubt whether it necessarily followed from the decision in *Boulter* v. *Kent Justices* (5) that a writ of certiorari will not lie in respect of proceedings before the licensing meeting. But that expression of opinion was unnecessary to the decision, and was not apparently shared by the other members of the Court. Moreover under s. 26, under which the present orders were made, the jurisdiction is to be exercised by the "local authority of the licensing district," and that expression is thereby defined to mean—"(1.) In the metro-

(1) [1898] 1 Q. B. 802.
(2) [1898] 1 Q. B. 578.
(3) [1899] 1 Q. B. 571.
(4) [1901] 2 K. B. 357.
(5) [1897] A. C. 556.

politan police district, the commissioner of police for the metropolis. (2.) In the City of London . . . . the commissioner of city police. (3.) In any other place, two justices of the peace in petty sessions assembled." But the question whether orders made under the section are judicial orders or not cannot depend upon whether they are made in London or in the country, and no one could contend that a commissioner of police sitting for the purpose of hearing applications for those exemption orders was sitting as a Court. The local authority under this section, whether they be justices of the peace or not, are acting in an administrative capacity only.

J. B. Matthews, in support of the rule.

[LORD ALVERSTONE C.J. You cannot ask us in this Court to overrule the decision in *Reg.* v. *Sharman*. (1)]

The principle of that decision is not to be extended: *Reg.* v. *Manchester Justices* (2); *Rex* v. *Sunderland Justices*. (3) It is to be regarded as confined to proceedings before the licensing committee alone. Here the section expressly provides that the orders shall be made, under the circumstances of this case, by justices of the peace in petty sessions assembled. Orders made by justices so sitting are judicial orders.

LORD ALVERSTONE C.J. In this case a rule has been obtained for a certiorari to bring up to be quashed certain orders made by justices of the county of Worcester whereby they authorized the licensed occupiers of the Lion Hotel and other public-houses at Upton-on-Severn to keep their premises open for the sale of intoxicating liquors between the hours of ten and eleven o'clock at night for the period specified in the orders. The facts which gave rise to the making of these orders were as follows: It appears that in the year 1874 the justices arrived at the rather extraordinary conclusion that a certain area within the parish of Upton-on-Severn, which area had a population of less than 1500 inhabitants, was a populous place, and they accordingly made an order declaring it to be so under s. 32 of the Licensing Act, 1874. This order was renewed

(1) [1898] 1 Q. B. 578. (2) [1899] 1 Q. B. 571.
(3) [1901] 2 K. B. 357.

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down to the year 1902, when it was revoked. It then seems to have occurred to the justices acting for the petty sessional division of Upton-on-Severn that the effect of that revocation might be got rid of by making an order, or series of orders, under s. 26 of the Licensing Act, 1872, extending the time for keeping open licensed premises in the district from ten o'clock to eleven. In coming to that conclusion I think that they hardly gave sufficient consideration to the object of the section under which they purported to act. The section says that "the local authority of any licensing district," who for the purposes of this district are defined to be two justices of the peace in petty sessions assembled, "upon the production of such evidence as such authority may deem sufficient to shew that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling, may grant, if such authority think fit, to any licensed victualler or licensed keeper of a refreshment house in respect of premises in the immediate neighbourhood of such market, or of the place where the persons follow such lawful trade or calling an order exempting such person from the provisions of this Act with respect to the closing of his premises on such days and during such time, except between the hours of one and two of the clock in the morning, as may be specified in such order." Purporting to act under that section, the justices have exempted twelve out of fourteen licensed persons in this small area for a period of three months from the obligation of keeping their premises closed between ten and eleven o'clock, and they have done so without any evidence whatever of the existence of the conditions upon which they are allowed by the section to act. It is not disputed that there is in this place no market; and the only words under which it was suggested the case could be brought were those relating to persons "following any lawful trade or calling." But those words were intended to refer to some special calling, such as that of night porters at a railway station, and the jurisdiction was intended to be confined to some particular public-house in the immediate vicinity of the place where the persons following that special calling worked;

whereas here the justices have specified as the persons following a lawful trade or calling farmers, tradesmen, fruit and pea dealers, and market-gardeners, a list which included a large portion of the inhabitants of the district, and have granted the exemption, not to one public-house only, but to practically the whole of the public-houses in the parish. It is perfectly clear, therefore, that they have not acted upon a consideration of the section, but have assumed a jurisdiction which they do not possess to extend the hours during which liquor may be sold merely because the general body of the inhabitants desired it. But then Mr. Amphlett has argued that even if the justices had no right to make the orders which they did, they are not judicial orders, and therefore a certiorari cannot be granted to bring them up. Considering that the persons by whom the jurisdiction is to be exercised are two justices of the peace in petty sessions assembled, and that they are to hear evidence for the purpose, I should certainly be of opinion, apart from authority, that the justices in exercising this jurisdiction are sitting as a Court, and that the order made by them is a judicial order, and consequently that certiorari would lie. Then is the state of the authorities such that we ought to hold otherwise? Reliance has been placed by Mr. Amphlett on the case of *Boulter* v. *Kent Justices* (1), in which it was held that a licensing committee of justices sitting for the purpose of hearing applications for licences were not sitting as a Court, and on the case of *Reg.* v. *Sharman* (2), in which Wright J. drew the deduction from the last-named case that therefore certiorari would not lie to bring up the order of a licensing committee to be quashed. In my opinion, however, the decision in those cases is not one to be extended beyond the particular case of a licensing committee, and in this I am supported by authority. In *Reg.* v. *Manchester Justices* (3) Channell J., while accepting the actual decision of *Reg.* v. *Sharman* (2), held that it did not apply to the orders of the confirming authority. And the same view was adopted by the Court of Appeal in *Rex* v. *Sunderland Justices*. (4) In that

(1) [1897] A. C. 556.
(2) [1898] 1 Q. B. 578.
(3) [1899] 1 Q. B. 571.
(4) [1901] 2 K. B. 357.

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case A. L. Smith M.R., referring to *Boulter* v. *Kent Justices* (1), said: "I see no ground for extending the effect of that decision to the present case. The decision in *Boulter* v. *Kent Justices* (1) related only to proceedings before the licensing meeting. The House of Lords held that the licensing meeting was not a Court of summary jurisdiction; and possibly it may follow therefore that a certiorari would not lie to bring up proceedings before the licensing meeting. In the case of *Reg.* v. *Manchester Justices* (2) Channell J. held that a certiorari would lie to bring up an order made by justices as the confirming authority under the Licensing Acts. I agree with him in the conclusion at which he then arrived, and in the grounds which he gave for it. Apart from *Boulter* v. *Kent Justices* (1), I think it would be clear that a certiorari would lie in this case." And Vaughan Williams L.J. said (3): "Speaking for myself I wish to go further, and to say that I do not think that it necessarily follows from the decision in *Boulter* v. *Kent Justices* (1) that a writ of certiorari will not lie in respect of proceedings before the licensing meeting, on the ground that a certiorari will only lie to bring up the order of a Court properly so called. It is not necessary to decide this point, but I can only say, speaking for myself, that, having regard to the general principles of the common law, I should have been disposed to think that wherever a body such as justices have under the provisions of a statute to grant or withhold a certificate, such as a certificate for a licence, and it appears from the statute that they have to exercise a judicial discretion in so doing, a certiorari would lie to bring up proceedings before them, in the case of erroneous exercise or excess of jurisdiction, whether they could or could not be said to have acted as a Court in the strict sense of the term." I therefore come to the conclusion that the justices in this case did in fact exceed the jurisdiction conferred upon them by the section by acting on matters which were not evidence in relation to the only issues that could be raised before them, and further that the orders which they made were in the

(1) [1897] A. C. 556. (2) [1899] 1 Q. B. 571.
(3) [1901] 2 K. B. at p. 370.

nature of judicial orders, and consequently that, as they were made without jurisdiction, the rule for a certiorari should be made absolute.

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KENNEDY J. I am of the same opinion. I do not think it necessary to add anything to what my Lord has said.

RIDLEY J. I agree, and for the same reasons.

Rule absolute for a certiorari.

Solicitors for applicant: *Blundell, Gordon & Co., for S. Thornley, Worcester.*

Solicitors for justices: *F. Brooke, for G. W. T. Coventry, Upton-on-Severn.*

J. F. C.

[CROWN CASE RESERVED.]

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April 8.

THE KING *v.* OLIPHANT.

Criminal Law—Falsification of Accounts Act, 1875 (38 & 39 *Vict. c.* 24), *s.* 1 *—Omission of Material Particulars—Jurisdiction—Offence partly committed Abroad.*

The defendant was employed by a firm, carrying on business in London, to manage their branch establishment in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, and to transmit these slips to them in London in order that the amounts might be entered up in a cash-book kept in London. On a certain date the defendant received three sums in Paris which he fraudulently appropriated to his own use, and omitted to enter the receipt thereof on the slips sent by him on that day to London, knowing and intending that the same would in consequence be omitted from the cash-book, as was the case. The defendant was indicted at the Central Criminal Court under s. 1 of the Falsification of Accounts Act, 1875, for omitting, or concurring in omitting, material particulars from the cash-book, and convicted:—

Held, that the Court had jurisdiction to try the case, and that the defendant was rightly convicted.

CASE stated by the Common Serjeant.

The case was as follows: The defendant was tried at the Central Criminal Court on an indictment charging him under

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s. 1 of the Falsification of Accounts Act, 1875 (1), as a clerk or servant with omitting, and concurring in omitting, material particulars from a book belonging to his employers with intent to defraud.

The evidence established that the defendant was employed in Paris as a clerk or servant by a firm of tailors, Messrs. Sandon & Co. of London, who had a branch establishment in Paris. He was paid a salary and commission upon orders, and received weekly remittances from London to meet expenses. It was his duty, among other things, to receive money on account of his employers at their shop in Paris, and to pay every day the sums so received into a Paris bank, and on every day on which he had received any such money to enter on slips furnished to him an account of every sum so received and transmit the same by post to the firm in London.

A book called the "Paris cash-book" was kept in the office in London shewing all the sums received and paid by the defendant in Paris for his employers. The entries in this book were made by Mr. Moore, one of the partners in the firm of Sandon & Co., items of receipts being entered from the slips made out and transmitted to London by the defendant. The defendant knew that this book was so kept, and that items omitted by him in his daily slips would necessarily be omitted in that book. He himself from time to time when in London went through the entries in that book with one of Mr. Sandon's clerks, and compared the entries with the slips he had sent from Paris, and caused any entries to be corrected which he shewed to be wrong. He went through the book in this way in August, 1904, after the misappropriation and omission from the book of two of the sums mentioned in the indictment.

On the date stated in the indictment the defendant received

(1) By the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), s. 1, it is enacted, "That if any clerk officer or servant . . . . shall wilfully and with intent to defraud . . . . falsify any book paper writing valuable security or account which belongs to or is in possession of his employer or has been received by him for or on behalf of his employer . . . . or omit or alter or concur in omitting or altering any material particular from or in any such book or any document or account, then in any such case the person so offending shall be guilty of a misdemeanour. . . ."

the three sums therein mentioned, and fraudulently appropriated them to his own use, and omitted each of these sums from the slips which he sent to London. The receipt of each of such sums was consequently omitted in the Paris cash account book.

The counsel for the defendant contended—

(1.) That the defendant could not upon this evidence be convicted of omitting, or concurring in omitting, particulars from the book referred to.

(2.) That there was no jurisdiction in the Court to try the case, as the offence was not committed in England.

The Common Serjeant reserved these points, and directed the jury that if they were satisfied that the defendant had fraudulently omitted from the slips returned to London the receipt of the sums he misappropriated, intending they should be omitted from the Paris cash account book and thereby caused such payments to be omitted in that book, and that his conduct and acts as above set out were a scheme of fraud, they should find the defendant "guilty." They thereupon returned a verdict of guilty.

The Common Serjeant postponed judgment, and released the defendant on bail.

The question for the Court was whether the defendant could rightly be convicted on any and which of the counts in the indictment.

A. E. Gill, for the defendant. First, there was no evidence that the defendant had committed the offence with which he was charged, and which related, not to slips drawn up by the defendant in Paris, but to the cash-book kept in London. The entries in that book were made by the defendant's employer, and the defendant's duties were not in any way connected with it. The fact that the consequence of the defendant's failure to enter on the slips some of the sums received by him was that these sums were omitted from the cash-book does not cause that omission to have been made by or concurred in by the defendant within the meaning of s. 1 of the Falsification of Accounts Act, 1875. *Reg.* v. *Butt* (1), which will be relied on

(1) (1884) 15 Cox, 564.

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by the Crown, is distinguishable, because in the present case it was the defendant's employer, not a fellow servant, who copied the entries from the slips into the cash-book, whereas in *Reg.* v. *Butt* (1) the decision proceeded on the ground that the clerk who made the entry was acting as the agent of his fellow clerk, who had falsely entered in the slip the sums received; but an employer cannot in law become the agent of his servant. There was also no evidence here that the defendant concurred in the omission from the cash-book.

Secondly, there was no jurisdiction to try the defendant in this country. This was not a case of an offence begun abroad and completed in this country; the offence of which the defendant was really guilty was the failure to fill up the slips correctly, and that offence was completed in Paris. The defendant's concurrence in the false entry at a later date (even if it is a concurrence in an omission within the statute) is not the offence charged, but a totally different one. It is a well-recognised rule of the criminal law that where an offence has been wholly committed abroad it cannot be tried in England: *Rex* v. *Munton* (2); *Johnson's Case* (3), per Lord Ellenborough; *Reg.* v. *Keyn.* (4) In *Rex* v. *Munton* (2) it was no doubt held that there was jurisdiction to try the case here, but that was because a false return had been sent by the defendant to and received in England. Here the slip was not false; the entries in it were correct, but it was incomplete by reason of the omission of three sums, and that omission, which is the gist of the offence, was made in Paris. Therefore no part of the offence was committed in this country. Decisions on questions of venue are no authority on questions of jurisdiction: *British South Africa Co.* v. *Companhia de Moçambique* (5); *Reg.* v. *Ellis.* (6)

R. D. Muir, for the prosecution. Where an offence consists of an omission to do an act, the offence is committed in the place where the duty ought to have been performed: *Reg.* v. *Davison.* (7) The duty cast upon the defendant was to send

(1) 15 Cox, 564.
(2) (1793) 1 Esp. 62; 8 R. R. 556.
(3) (1805) 29 How. St. Tr. at p. 411; 8 R. R. 597.
(4) (1876) 2 Ex. D. 63.
(5) [1893] A. C. 602.
(6) [1899] 1 Q. B. 230.
(7) (1855) 7 Cox, 158.

slips from Paris so that the books might be correctly made up in London. The defendant omitted to do that, and his omission took effect in London. *Reg.* v. *Butt* (1) covers the first point reserved. With regard to the question of jurisdiction, an act committed out of the jurisdiction, but having an effect within the jurisdiction, is triable in the place where it has that effect: *Johnson's Case* (2), per Abbott arguendo; *Rex* v. *Brisac.* (3) In Chitty's Criminal Law, 2nd ed. at p. 191, it is stated that "if a person in Ireland procures another to publish a libel at Westminster he may be indicted in Middlesex, and where a person by means of an innocent agent procures a felony to be done in another county, he may be indicted there though personally present"; and *Rex* v. *Girdwood* (4) and *Rex* v. *Coombes* (5) are cited as authorities for that proposition. So here the defendant by sending the incorrect slips caused or procured the omission from the book in London. Decisions on venue before 7 Geo. 4, c. 64, are authorities on questions of jurisdiction.

Gill replied.

LORD ALVERSTONE C.J. I have no doubt that this conviction ought to be affirmed. The real point in the case is that which was put by Mr. Muir, namely, what was the duty that the defendant had to perform, and what was the act done by him which is alleged to be the omitting, or the concurring in omitting, to make an entry. In my opinion the language of s. 1 of the Falsification of Accounts Act, 1875, has been intentionally made somewhat wide in its terms in order to prevent a class of fraud of which the case of *Reg.* v. *Butt* (1) affords an example. The duty of the defendant, as stated in the case, was to receive money on account of his employers at their shop in Paris, and to pay the sums so received into a Paris bank, and to enter on slips each day the sums so received, and to transmit these slips by post to his employers. A book called the Paris cash-book was kept in the London office, in

(1) 15 Cox, 564.
(2) 29 How. St. Tr. at p. 392.
(3) (1803) 4 East, 164; 7 R. R. 551.
(4) (1776) 1 Leach, 142.
(5) (1785) 1 Leach, 388.

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which the sums received in Paris were entered: I understand that to mean that the object of imposing on the defendant the duty of transmitting the slips from Paris day by day was that this book might be correctly entered up by means of the information which he had to supply. The case further states that the defendant knew that the Paris cash-book was kept in London, and that items omitted by him from the slips would necessarily be omitted from the book. There were no other means by which a check could be kept day by day on the sums received by the defendant in Paris, and therefore it was essential that these sums should be correctly entered by the defendant upon the slips. The defendant did not enter upon the slips all the sums which he received; and as the defendant knew that an omission from a slip would necessarily involve an omission from the book, it seems to me to follow that he has omitted, or concurred in omitting, a material particular from the book. I am unable to draw any distinction between sending information by post or by telephone and giving the same information by direct personal communication in London. The case further finds that the defendant came to London and went through the book and the slips, after the misappropriation and omission from the slips of two of the sums mentioned in the indictment, and that he did not then cause any correction to be made; but I do not base my decision upon that fact only. I think the conviction could have been justified even if the defendant had not come to London. I think that the direction given by the Common Serjeant to the jury put the case as strongly as it could be put in the defendant's favour, and that it cannot be said that that direction allowed the defendant to be wrongly convicted.

It was said on behalf of the defendant that the fact that the entries in the book were made by the defendant's employer prevented the case from coming within the statute; but the case of *Reg.* v. *Butt* (1) is sufficient authority to shew that that argument cannot be seriously pressed; it is only necessary to refer to the judgment of Lord Coleridge C.J. in that case to shew that an omission from an entry made by an innocent

(1) 15 Cox, 564.

person under the direction of another is an omission by that other within the meaning of the statute.

In my opinion this case comes within the principle of *Rex* v. *Munton*. (1) In that case the defendant was the principal storekeeper at Antigua. He purchased certain stores in England at a nominal price agreed upon between him and the seller, which price he charged to the Government in his returns to the Navy Office, and by collusion with the seller the latter made to him an allowance, by which the Government were defrauded to a large amount. It was contended for the defendant that the offence had been wholly completed in the West Indies, and that therefore the Court had no jurisdiction to try the defendant; but Lord Kenyon disposed of this objection by pointing out that "it appeared that the several false charges made by the defendant by which he had defrauded the Government had been in the several returns made by him from Antigua to the Navy Office in London. There was thereby an offence committed in London where such false returns were received, and where the fraud had been complete by their having been there allowed, upon which the jurisdiction of the Court attached." Mr. Gill endeavoured to draw a distinction between that case and the present one on the ground that there was a false return and here there was an omission from a return. I cannot see the distinction makes any difference. It seems to me that if a man receives, say, five sums and accounts for four, but makes no mention in his return of the fifth, the return is just as much a false return as if a man, having received 15*l.*, incorrectly entered in his return 10*l.* as being the amount received. *Rex* v. *Brisac* (2) lays down the same principle as *Rex* v. *Munton*. (1)

For these reasons I am of opinion that this conviction must be affirmed.

LAWRANCE J. I am of the same opinion, and entirely agree with the judgment of my Lord.

KENNEDY J. I am not prepared to differ from the decision of the other members of the Court; but the case is one which,

(1) 1 Esp. 62; 8 R. R. 556. (2) 4 East 164; 7 R. R. 551.

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Kennedy J.

in my opinion, gives rise to a difficult question. The difficulty which I feel arises from the fact that the defendant is not charged with any wrong-doing in connection with the slips which he drew up himself, but with causing, or concurring in, the omission of a material particular from a book which was not under his control and was kept in this country whilst the defendant was in Paris; and although the defendant acted dishonestly in failing to send an accurate account of the sums received by him, yet I have felt a doubt as to whether we can say that the mere fact that his incorrect communication resulted in an omission from the book brings him within the language of the statute. To put the question in the plainest form, could a clerk who omitted to make an entry in a cash-book, thereby causing another clerk to omit to make an entry in a ledger, be convicted of omitting, or concurring in the omission of, the entry in the ledger? I confess I have some doubt as to whether he could be convicted. But there is this to be said in the present case. The Common Serjeant in directing the jury told them that if they were satisfied that the defendant had fraudulently omitted from the slips the sums which he had misappropriated, intending that they should be omitted from the cash-book, and had thereby caused them to be omitted from the book, they ought to find him guilty, and the jury did so. If there was evidence which could properly be left to the jury of an intention on the part of the defendant that the book should be rendered incorrect by reason of his omissions from the slips, I am not prepared to differ from the judgment of my Lord.

RIDLEY J. I agree with the judgment of the Lord Chief Justice. After hearing the arguments in this case, I do not share the doubts which have been expressed by my brother Kennedy. I think that the finding of the jury, taken in connection with the direction of the Common Serjeant, establishes that the omission from the slips of the amounts received was part of a scheme of fraud for causing the omission of payments from the cash-book, and those being the facts there was, in my opinion, jurisdiction to try the case in London. The only

authority to which I need refer is the case of *Rex* v. *Munton* (1), which is, I think, clear authority for saying that the receipt of the slips in London makes the offence complete in London; and I agree with my Lord that there is no difference between the insertion of a wrong amount in a slip and the omission of one of several sums received.

CHANNELL J. I agree that this conviction must be affirmed; but I share my brother Kennedy's doubt as to whether it has been made out that the defendant had any duty as to keeping this book in London. I do not think that a clerk or servant who makes a false return to his employer, knowing that the employer keeps books which will accordingly be rendered incorrect, necessarily falsifies those books, or concurs in the omission of an entry from the books which they would have contained if the return had been correctly made. I think that to justify a conviction under this statute the person charged must have had something to do with the keeping of the book in question. That, of course, is a question which must depend, not upon any principle of law, but upon the particular facts of each case; and as I am not prepared to say that there was not some evidence in this case on which the jury could find the defendant guilty, I agree that the conviction must be affirmed.

Conviction affirmed.

Solicitor for defendant: *Barrington Matthews.*
Solicitor for the Crown: *F. Freke Palmer.*

(1) 1 Esp. 62; 8 R. R. 556.

F. O. R.

1905
April 10.

FAULKNER *v.* THE KING.

Criminal Law—Indictment for Offence after previous Conviction—Arraignment—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 116—*Error.*

Sect. 116 of the Larceny Act, 1861, provides that "In any indictment for any offence punishable under this Act and committed after a previous conviction" the offence may be charged in the manner therein specified; and the section then goes on to say that "the proceedings upon any indictment for committing any offence after a previous conviction . . . . shall be as follows":—

Held, that the words "for committing any offence" in the latter paragraph are perfectly general and not limited to offences punishable under that Act.

A prisoner was indicted at quarter sessions for attempting to commit larceny, and a subsequent count in the indictment charged a previous conviction. The prisoner was arraigned upon and pleaded to both counts. Objection was taken on his behalf to the arraignment as contravening the provisions of s. 116 of the Larceny Act, 1861, which require that upon an indictment for an offence after a previous conviction the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and that until he be found guilty of that offence he shall not be called upon to plead to the charge of the previous conviction. The recorder accordingly adjourned the trial to the next sessions. At that sessions the prisoner was tried. There was no fresh arraignment, but his former pleas were treated as standing. He was, however, given in charge to the jury upon the first count only, and was found guilty and sentenced on that count:—

Held, that although the arraignment did not take place at the sessions at which the prisoner was tried, and although the fact of the previous conviction was not disclosed to the jury by whom he was convicted, either by the manner of giving him into their charge or otherwise, the fact that the arraignment did not comply with the provisions of the section was such a substantial defect as could not be cured by verdict, and that the conviction must be quashed.

ERROR in proceedings on indictment.

The prisoner was charged at the Birmingham Quarter Sessions held in February, 1904, upon an indictment containing three counts. The first count charged that he on December 8, 1903, attempted to steal the sum of 1*l.* 18*s.*, the moneys of the prosecutor Albert Grove. The second count charged an offence under s. 7 of the Prevention of Crimes Act, 1871, namely, that on February 20, 1899, he was convicted at the

Birmingham Quarter Sessions of felony, and a previous conviction for felony was then proved against him, and that afterwards, within seven years after the expiration of the sentence passed on him for the last of such crimes, to wit, on December 8, 1903, he was found in the shop of the said Albert Grove under such circumstances as to shew that he was about to commit larceny of the moneys of Albert Grove. The third count charged that previously to the commission of the misdemeanour charged in the first count, to wit, on July 1, 1902, he was convicted of felony at the Stafford Quarter Sessions.

The prisoner was arraigned upon all three counts at the same time, and pleaded not guilty to all three. He was given in charge to the jury on the whole indictment, and the trial proceeded until the whole of the evidence had been given; and then before the jury considered their verdict the prisoner's counsel objected to the validity of the arraignment, as being contrary to the provisions of s. 116 of the Larceny Act, 1861. (1) The assistant recorder upheld the objection and discharged the jury, and the case was remitted for trial to the next sessions. On May 17 at the Easter sessions the prisoner was again brought up for trial before the recorder. He was not freshly arraigned nor was any fresh plea taken, and he was given in charge to the jury upon the first count only. The jury convicted the prisoner, and he was sentenced on the first count.

(1) By s. 116 of the Larceny Act, 1861, "In any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place or at certain times and places convicted of felony or of an indictable misdemeanour, or of an offence or offences punishable upon summary conviction (as the case may be) without describing the previous felony, misdemeanour, offence or offences; . . . . And the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows—that is to say, the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty . . . . the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty . . . . he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment."

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He subsequently sued out a writ of error, assigning as error appearing upon the record that the provisions of s. 116 of the Larceny Act, 1861, as extended by s. 9 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), were contravened, inasmuch as he was arraigned upon and called upon to plead and did plead to the three counts in the indictment at one and the same time.

H. H. Joy, as amicus curiæ. (1) It will be said that this was a case to which s. 116 of the Larceny Act does not apply, upon the ground that the provisions of that section are confined to offences punishable under that Act, of which the offence charged in the first count, an attempt to commit larceny, is not one. But the words in the latter part of that section, "And the proceedings upon any indictment for committing *any* offence after a previous conviction," are general, and ought not to be read in that limited sense. They were meant to apply to indictments for any offence after a previous conviction, whether punishable under the Larceny Act or any other Act, or at common law. Then if so, the provisions of that section were not followed. The only arraignment upon which the prisoner was tried was that which took place at the first trial, and which was admittedly bad, as the prisoner was called upon to plead to the first and third counts at the same time. There was probably no objection to his being called upon to plead to the first and second counts together, notwithstanding that the second count charged a previous conviction, for there the previous conviction was charged as an ingredient in a substantive offence, and under those circumstances there is no objection to disclosing the fact of the previous conviction to the jury: *Rex* v. *Penfold*. (2) And a prisoner may be properly called upon to plead to any number of counts for misdemeanours together. But a count, such as the third count here, which charges a previous conviction, not as an element in a substantive offence, but merely as matter for increasing

(1) Upon the argument in error no counsel appeared for the prisoner, but the Court allowed Mr. Joy, who had defended him at the sessions, to appear as amicus curiæ and state the points upon the prisoner's behalf.

(2) [1902] 1 K. B. 547.

the penalty for an offence charged in another count, stands on a different footing. The fact that here the arraignment was not in the presence of the second jury makes no difference. The section is imperative. The defect could only have been got rid of by a fresh arraignment at the second trial omitting the third count; but the prisoner was not freshly arraigned.

J. G. Hurst, for the Crown. First, the assignment of error is bad. The case does not fall within s. 116 of the Larceny Act. The scope of the section is limited by the opening words, "In any indictment for any offence punishable under this Act," which must be taken as governing the later words "proceedings upon any indictment for committing any offence." If there were any reasonable doubt upon this matter, that doubt is removed by the fact that the Legislature thought it necessary in s. 9 of the Prevention of Crimes Act, 1871, to provide that the rules of s. 116 should apply to indictments for crimes defined by that Act whether punishable under the Larceny Act or not—a provision which would have been wholly superfluous if the application of s. 116 were intended to be general. It follows that an attempt to commit larceny, being a common law misdemeanour and not punishable under the Larceny Act, is not within the section. Nor does the case fall within s. 9 of the Prevention of Crimes Act, 1871, for the definition of "crime" in s. 20 of that Act does not include attempted larceny. Secondly, in any case error will not lie here, for the writ of error only lies for a substantial defect, and here the defect was not substantial, but formal only. Nothing was said in the hearing of the second jury, by whom the prisoner was convicted, to suggest that he had been previously convicted; and there was no unfairness in his trial. The defect in the proceedings being purely formal is cured by verdict.

KENNEDY J. In my view this application in error must succeed. The prisoner was charged upon an indictment containing three counts. The first count charged the misdemeanour of attempting to commit larceny. The second charged that after two previous convictions for felony he was

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Kennedy J.

found in the prosecutor's shop under such circumstances as to shew that he was about to commit larceny, thereby committing an offence under s. 7 of the Prevention of Crimes Act, 1871. While the third count charged that before the commission of the misdemeanour in the first count mentioned he had been convicted of felony. He was arraigned upon all three counts, and pleaded not guilty to them all. The trial proceeded and the evidence was heard, and before the jury returned their verdict counsel for the prisoner took objection to the arraignment. The deputy recorder allowed the objection, and in the exercise of his discretion discharged the jury and remanded the prisoner to the next sessions. At the next sessions the prisoner was again brought up for trial, and upon the same indictment, this time before the recorder. There was no fresh arraignment, and the prisoner's original pleas to the whole indictment were treated as standing good. He was, however, given in charge to the jury this time upon the first count only, and he was found guilty and sentenced upon that count. Under these circumstances the prisoner has moved to have the conviction quashed for error on the record, in that he was arraigned upon and called upon to plead to and did plead to the three counts in the indictment at one and the same time, contrary to the provisions of s. 116 of the Larceny Act. It was contended for the Crown that the danger of unfairness in the trial which that section was intended to provide against did not exist here, inasmuch as the trial took place before a different jury who had not heard the arraignment and did not know of the fact that the prisoner had pleaded to the whole indictment. But that in my opinion makes no difference. The section has not been complied with, and we are not at liberty to dispense with compliance. To the general rule laid down by that section, that no mention shall be made of the previous conviction until after conviction of the subsequent offence, there is, so far as I know, only one exception, namely, where the previous conviction is a necessary ingredient in the offence, as is the case with the offences created under s. 7 of the Prevention of Crimes Act. On the trial of an indictment for an offence under that section it is

proper that the previous conviction should be disclosed to the jury at the outset: *Rex* v. *Penfold*. (1) But in all other cases the provisions of s. 116 must be strictly followed, and the neglect to follow them constitutes a sufficiently substantial defect in the proceedings to entitle the prisoner to have the conviction quashed upon a writ of error. A defect of that kind is not one that can be cured by verdict. It is doubtful whether a count charging a previous conviction for felony before an attempt to commit larceny is permissible at all, for no citation has been given us of any Act of Parliament attaching to that particular misdemeanour a higher penalty by reason of a previous conviction; but be that as it may, the count, good or bad, was there, and the previous conviction was disclosed by the arraignment and pleas. Then it was further contended for the Crown that s. 116 of the Larceny Act did not apply at all to this particular case, because that section, it was said, is confined to indictments for offences punishable under the Act, of which the misdemeanour of attempting to commit larceny is not one. But I cannot agree that its application is so confined. The words are: "The proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows." Those words are sufficiently general to include an indictment for attempting to commit larceny. I am of opinion that the assignment of error is good, and that the conviction must be quashed.

RIDLEY J. I am of the same opinion. I think we are bound to allow the prisoner's objection to the proceedings and to order the conviction to be quashed, though in doing so we are doing something altogether apart from the merits of the case, the actual trial having been conducted with perfect fairness and propriety. But, in the absence of a fresh arraignment and a fresh plea, the defect in the proceedings at the first trial is one that cannot be got rid of. The language of s. 116 of the Larceny Act, assuming that it applies to this case, is express, and we are not entitled to disregard a non-compliance with the provisions of that section merely because we may

(1) [1902] 1 K. B. 547.

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Ridley J.

think that under the circumstances no injustice has been done. We must bear in mind what was said by Whiteside C.J. in *Reg.* v. *Maria Fox* (1), namely, that "this enactment was intended to prevent the previous conviction being mentioned even by accident before a verdict of guilty of the subsequent offence was delivered." It is enough that, in consequence of the procedure indicated by the section not being followed, the fact of the previous conviction might come to the ears of the jury, however remote that contingency might be. Then do the provisions of s. 116 apply to this case? I am of opinion that they do. It may be that the offence of attempting to commit a larceny is not an offence punishable under the Larceny Act, but that in my opinion is immaterial. The section says: "And the proceedings upon any indictment for committing *any* offence after a previous conviction or convictions shall be as follows." The words "any offence" are perfectly general. They ought not, I think, to be treated as limited to "any offence punishable under this Act," but as extending to offences of all kinds, including that with which the prisoner was here charged—the offence of attempting to commit larceny.

Conviction quashed.

Solicitor for prosecution: *J. E. Hill, Birmingham.*

(1) (1866) 10 Cox C. C. 502.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1905
April 3.

HARDING *v.* BUSSELL.

Insurance, Marine—Practice—Discovery—Affidavit of Ship's Papers—Partial Land Transit.

In an action against an underwriter upon a policy of insurance, which is substantially a marine insurance, the fact that a part of the transit is by land does not affect the right of the defendant to an affidavit of ship's papers.

Henderson v. *Underwriting and Agency Association*, [1891] 1 Q. B. 557, questioned.

APPEAL from an order of Channell J.

The writ in the action was indorsed with a statement of claim which alleged that the plaintiff was interested to the full amount insured under certain policies of marine insurance upon boxes of haddocks and kippers, the date, amount, and the defendant's subscription to which were respectively hereinafter stated, together with the amount and particulars of the plaintiff's claims under the policies. The particulars were then set out. The policies were eight in number, and were in the ordinary Lloyd's form of marine policies with certain additions, among which was the following clause relating to land transit: "Including risk by land and water, especially of craft, boats, transhipment, and fire from the time of leaving the supplier's warehouse and while waiting shipment at intermediate warehouses or elsewhere until delivered to the consignees' warehouse and/or stores and/or go-downs . . . ." The eight policies covered shipments by seven different vessels, and comprised transits from London to Durban; Hull to London, and whilst there and thence to Durban; Hull to Southampton, whilst there and thence to Durban; Hull to London, and whilst there and thence to Southampton, whilst there and thence to Durban; and Hull to Durban. The transit between Hull and London and London and Southampton was in each

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case by rail. The insurance was against all risks of every kind however caused, including pilferage and inherent vice.

The defendant applied to the learned judge for an order for the delivery of the usual affidavit of ship's papers, which was refused.

The defendant appealed.

J. A. Hamilton, K.C., and *Leck*, for the defendant. It has become usual to insert in policies in the form of an ordinary Lloyd's policy clauses insuring transit from warehouse to warehouse. The principle on which the special discovery is required in cases on marine policies is equally applicable to cases like the present one, where in substance the policies are marine although a portion of the transit is by land. The reasoning on which the practice is based is stated in *China Steamship Co.* v. *Commercial Assurance Co.* (1); *China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation* (2); and more recently in *Boulton* v. *Houlder Brothers.* (3) It is no answer to this application to say that as all risks are insured it is not material how the risk occurred, for the defendant has a right to information as to the persons with whom he was contracting in order to determine the question of the interest of the plaintiff.

If the decision in *Henderson* v. *Underwriting and Agency Association* (4) can be supported it may be distinguishable, for the subject-matter of the insurance was during the land transit in the hands of the Post Office, a Government department over which the assured could have no control.

Scrutton, K.C., and *L. Batten*, for the plaintiff. The policies in these cases cover all risks, and the question who are the parties interested can be determined by an ordinary affidavit of documents. There is therefore no need for an affidavit of ship's papers, and the learned judge was right in refusing to make an order.

The practice as to ship's documents does not apply to land

(1) (1881) 8 Q. B. D. 142.
(2) [1898] 2 Q. B. 187.
(3) [1904] 1 K. B. 784.
(4) [1891] 1 Q. B. 557.

transit. It originated at a time when it was necessary to apply for discovery to a Court of Equity—*Goldschmidt* v. *Marryat* (1)—and it was confined to actions on marine policies: per Cleasby B. in *West of England Bank* v. *Canton Insurance Co.* (2) The question whether an affidavit of ship's papers can be demanded where a portion of the transit is by land was expressly decided in *Henderson* v. *Underwriting and Agency Association* (3), followed by Kennedy J. in *Village Main Reef Gold Mining Co.* v. *Stearns.* (4) In the former case the different effect of the two orders was brought before the Court in the course of the argument, and it was held that the practice that prevails in marine insurance actions did not apply although the risk in that case was in some respects a marine risk. If it is said that the reason for that decision was that the assured had no control over the Post Office authorities, the same may be said here, for the plaintiff has no control over the railway companies who conveyed the goods between Hull and London and London and Southampton. There is no reason for extending the practice, which originated at a time when there was no effective machinery, as there now is, for discovery in Common Law Courts.

MATHEW L.J. I think the conclusion to which we ought to come in this case is perfectly clear. There is authority that the underwriters are entitled to that which they are asking for. The policy in this case is in substance a marine policy although it does cover a short transit by land from ship to warehouse, and in consequence of the provision to that effect we are asked to say that the practice as to ship's papers does not apply. Now what is the origin of this practice, that an underwriter is entitled at the earliest stage of an action on a policy of insurance to an affidavit of ship's papers? The answer is indicated by a long series of authorities. The underwriter is so entitled because he can get the information as to his position in no other way. He is entitled to be treated with absolute good faith and to have information from the assured as to all that

(1) (1808) 1 Camp. 559; 53 R. R. 268.
(2) (1877) 2 Ex. D. 472, at p. 474.
(3) [1891] 1 Q. B. 557.
(4) (1900) 5 Com. Cas. 246.

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Mathew L.J.

has been done with reference to the subject-matter of the insurance. The question of interest is often the important one in cases of this sort, and it appears to arise in this case. The underwriter is entitled to information to enable him to see whether the plaintiff suing him is the person whose interest is covered by the policy of insurance, and to all the information that he has, in the ordinary course, with reference to the voyage, the shipment, the carriage, and the arrival of the goods. I understand the learned counsel for the respondent to say that when the affidavit of ship's papers is made, it is not probable that the defendant will find anything that is material, but he is entitled to judge of that for himself. It is further said that it may be highly inconvenient and embarrassing in a particular case to compel the shipper of goods to obtain the information that the underwriter asks for; but the Court will not permit the procedure to be used for the purpose of delay. I see no indication in the present case of an intention to create delay. The underwriter is entitled at the earliest moment to know whether he ought to pay or not. The information must be placed at his disposal by an affidavit of ship's papers.

It was said that, whenever any part of the transit covered by the insurance is by land, it had been decided that there is no right to an affidavit of ship's papers. In the statement of the grounds on which discovery ought to be made in the case of a marine policy by Lord Esher in *China Steamship Co.* v. *Commercial Assurance Co.* (1) no such distinction is made; but it is said that the point was settled in *Henderson* v. *Underwriting and Agency Association.* (2) That was a peculiar case, and the judgment is contained in a short passage which seems to indicate that it was thought it would be sufficient if the ordinary affidavit of documents was ordered at the stage at which the case had arrived when the application was made. It is a departure from the ordinary practice, and it appears to have been thought that an ordinary affidavit of documents would be equivalent to all that could be obtained by an affidavit of ship's documents. If I were called on to express an opinion I should doubt whether the decision was a correct one. It

(1) 8 Q. B. D. 142. (2) [1891] 1 Q. B. 557.

appears to have influenced my brother Kennedy in the case that came before him, and he appears to have treated it as an authority that wherever any portion of the venture is a transit by land there is no right to an affidavit of ship's papers. In that view I cannot concur. As I have said, the reasons for ordering an affidavit of ship's papers apply equally in a case where a part of the transit is by land. The other cases which were cited as authorities for the general rule need not be discussed, and I see no reason why the ordinary practice should be departed from in this case.

I come to the conclusion, therefore, that this appeal should be allowed.

COZENS-HARDY L.J. I am of the same opinion, and have nothing to add.

Appeal allowed.

Solicitors for plaintiff: *Stanley, Woodhouse & Hedderwick.*
Solicitor for defendant: *James Ballantyne.*

A. M.

1905
April 12.

SMITH *v.* SAVAGE.

Adulteration—Sample—Purchase for Analysis—Mode of dividing Sample—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

Upon the hearing of an information under s. 6 of the Sale of Food and Drugs Act, 1875, it appeared that the purchaser asked the seller, a grocer, if he sold cream of tartar, and the seller produced a box containing penny packets labelled cream of tartar. The purchaser asked for, and was supplied with, four packets from the box, all of which were similar in size, outward appearance, and label and paid fourpence for them; he then emptied the contents of the four packets into one heap and divided the whole quantity into three parts and sealed them up, handing one part to the seller, another to the public analyst, and retaining the third himself:—

Held, that each packet was not a separate article for the purposes of the Act, and that the mode in which the contents of the packets were dealt with by the purchaser was a sufficient compliance with the requirements of s. 14 of the Act.

Mason v. *Cowdary*, [1900] 2 Q. B. 419, distinguished.

CASE stated by justices for the county of Wilts.

The respondent had appeared to answer an information preferred by the appellant, an inspector of weights and measures, under s. 6 of the Food and Drugs Act, 1875, charging him with having unlawfully sold to the appellant to his prejudice as the purchaser a certain drug, to wit, four penny packets of cream of tartar, which were not of the nature, substance, and quality of the article demanded. At the hearing the following facts appeared.

The appellant, who was the officer duly appointed by the Wilts County Council as the inspector under the Sale of Food and Drugs Acts, visited the respondent's place of business and saw the respondent, who carried on business as a grocer. The appellant saw some packets of cream of tartar in the shop and asked the respondent if he sold cream of tartar, whereupon the respondent produced a box containing packets labelled "Finest Cream of Tartar—98 per cent. Bicarbonate of Potassium. B. P. 1898." The appellant asked for four packets, and was supplied with four packets, which were all similar in size and outward appearance and label and were taken from the same

box. He paid fourpence for them, and told the respondent that the purchase had been made for the purpose of analysis by the county analyst. The appellant emptied the contents of the four packets into one place, and then divided the whole of the contents or matter into three parts and sealed them up. One of the three packets was sent by registered post to the county analyst, another was handed to the respondent, and the third was retained and produced to the justices by the appellant. The appellant said that cream of tartar mixed with bicarbonate of soda was used in baking powder, and also in the preparation of cakes, seidlitz powders, and summer drinks. From the certificate of the public analyst it appeared that the sample sent to him, which weighed about $1\frac{3}{4}$ oz., contained lead in the proportion of three-fourths of a grain per pound; cream of tartar prepared according to the British Pharmacopœia should not contain lead.

It was contended for the respondent that the appellant made four separate purchases, each packet being an article, and that the appellant did not, by mixing together the contents of the four packets and then dividing the substance so mixed into three parts, comply with s. 14 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and the case of *Mason* v. *Cowdary* (1) was referred to.

It was contended for the appellant that the respondent should be convicted, that the facts in the case were not similar to those in *Mason* v. *Cowdary* (1), and that s. 14 had been properly complied with in the present instance, inasmuch as the entire purchase had been properly divided into three parts as directed by the Act.

The justices dismissed the summons, and the question for the opinion of the Court was whether upon the facts found as stated in the case the dismissal was right. (2)

(1) [1900] 2 Q. B. 419.

(2) By s. 14 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analyzed by the public analyst, and shall [offer to] divide the article into three parts to be then and there separated, and each part to be marked and sealed

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Holman Gregory, for the appellant. There were not four separate purchases of four separate articles by the appellant. Each packet was not a separate article within the meaning of s. 14 of the Act of 1875, but the four packets formed one entire purchase. The object of purchasing the four packets was to obtain a sufficient quantity for analysis, and the requirements of the section were complied with by mixing the contents of the four packets and dividing them when mixed into three parts. The case is distinguishable from *Mason* v. *Cowdary* (1), where six bottles of camphorated oil were bought and the bottles divided into three lots without being opened or their contents mixed, and it may be inferred from the judgment of Darling J. in that case that in his opinion the opening of the bottles and the mixing or dividing the contents would have satisfied the statute.

Bonsey, for the respondent. The decision of the justices was right. The appellant asked for four penny packets, and there were four separate purchases of four separate articles. The case is not distinguishable in principle from *Mason* v. *Cowdary*. (1) If the contention of the appellant is correct, the hardship on the seller in such a case would be considerable, for he might have purchased some of the packets from the wholesale dealer with a written warranty and some without, and he would be deprived of the opportunity of setting up the warranty as a defence under s. 25.

[LORD ALVERSTONE C.J. On the other hand, a man might evade the statute by putting up things in quantities so small as not to admit of a proper analysis.]

Holman Gregory, in reply.

LORD ALVERSTONE C.J. Although I have not felt altogether free from doubt during the course of the argument, I have

or fastened up in such manner as its nature will permit, and shall, if required to do so, [proceed accordingly, and shall] deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analyzed, to the analyst."

By s. 13 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), the words above printed in brackets are repealed.

(1) [1900] 2 Q. B. 419.

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come to the conclusion that upon the whole this appeal must succeed. If the question were to arise of different articles, or articles supplied by different persons, but sold under a similar name, being mixed together in the shop of the retail seller by a purchaser for the purpose of analysis, objection might well be taken to such a mixing on the ground of the difference in quality of the articles mixed; but that is a different question to the one which is raised in the present case. Here the appellant asked for cream of tartar, which, as he saw, was put up in penny packets for the purpose of measurement; he said that he would take four penny packets, and I cannot say that, because four packets of the same article similarly labelled were bought at the same time as cream of tartar and then mixed together and divided for the purposes of analysis, the mixing of them together was a good objection to the proceedings subsequently taken upon the analyst's certificate. The case of *Mason* v. *Cowdary* (1) was cited to us as an authority in favour of the respondent, but that decision is clearly distinguishable, as the facts were by no means the same as those in the present case. I think, therefore, that the case must be remitted to the justices to be heard on the merits.

KENNEDY and RIDLEY JJ. concurred.

Appeal allowed.

Solicitor for appellant: *Ernest Bevir, for Harry Bevir, Wootton Bassett.*

Solicitors for respondent: *Neve, Beck & Kirby.*

(1) [1900] 2 Q. B. 419.

W. J. B.

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March 10, 13, 14.

WEHNER AND OTHERS *v.* DENE STEAM SHIPPING COMPANY AND OTHERS.

Ship — Charterparty — Sub-charterparty — Bill of Lading — Contract — Shipowner's Lien for unpaid Hire — Hire accruing Due — Withdrawal of Ship — Payment of Hire.

When a ship is chartered, the charterparty being in the ordinary form and not amounting to a demise of the ship, and subsequently the ship is sub-chartered for a single voyage and bills of lading are signed by the captain in respect of cargo carried on that voyage, the contract contained in the bills of lading is a contract with the owner of the ship. The owner, or the captain as his agent, is entitled to collect the bills of lading freight, and to deduct from it any charterparty hire then owing, accounting for the balance, if any, to the sub-charterers. The rights of the parties are the same if the freight is collected by the ship's agent, appointed by the sub-charterers, he being for this purpose either the agent of the owner or the agent of all parties.

Marquand v. *Banner*, (1856) 6 E. & B. 232, distinguished.

A shipowner is not entitled to exercise a lien on freight in the hands of the ship's agent for charterparty hire not due but accruing due at the time the lien purported to have been exercised.

Where a charterparty provides that hire is to be paid half-monthly in advance, and that in default of payment the owner may withdraw the ship from the service of the charterer without prejudice to any claim the owner may otherwise have against the charterer, if the owner withdraws the ship in the middle of a half-month, he is only entitled to be paid hire in respect of that portion of the half-month during which the ship was in the service of the charterer.

ACTION in the commercial list tried without a jury.

The plaintiffs were a firm carrying on business in New York. The defendants, the Dene Steam Shipping Company, were the owners of the steamship *Ferndene*. The other defendants were a firm carrying on business at Hamburg under the style of H. Vogemann, and were made parties to the action in respect of a branch of the claim to which it is unnecessary to refer for the purpose of this report.

By a charterparty dated November 11, 1901, the Dene Steam Shipping Company, who throughout this report are referred to as the defendants, chartered the *Ferndene* to the William Brauer Steamship Company for the period of twelve

months from the time the steamer was delivered to the charterers.

The charterparty provided that the charterers should have liberty to sub-let the steamer for all or any part of the time covered by the charter. The hire was 1100*l.* per month, payable half-monthly in advance at noon on the 9th and 23rd day of each month; and in default of payment the defendants were to have "the faculty of withdrawing the said steamer from the service of the charterers" without prejudice to any claim they might otherwise have against the charterers under the charterparty.

The charterparty contained the following, amongst other, clauses:—

"7. The cargo or cargoes are to be laden $\frac{\text{and}}{\text{or}}$ discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided that the steamer can always safely lie afloat at any time of tide.

"8. The whole reach of the vessel's holds, decks, and usual places of loading and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel.

"9. The captain (although appointed by the owners) shall be under the order and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with the same.

"19. The owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned."

The charterparty provided that at the termination of the hire the charterers should redeliver the steamer to the defendants at a port in the United States north of Cape Hatteras.

On September 25, 1902, during the currency of the charterparty, the charterers sub-chartered the *Ferndene* to the plaintiffs

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for one Transatlantic trip, at a hire of 1120*l.* per month, to be paid semi-monthly in advance. The sub-charterparty contained clauses similar to those set out above. Under freight arrangements made by the plaintiffs through one Lennard with one Gleichmann, the *Ferndene* loaded a cargo of phosphate at New York for delivery at Hamburg. The bill of lading, dated November 3, 1902, was signed by the master of the *Ferndene* and handed to the plaintiffs, and by them indorsed to Gleichmann, who took delivery of the cargo upon the terms of the bill of lading.

On December 13, 1902, the *Ferndene* arrived at Hamburg. The plaintiffs appointed the defendants, H. Vogemann of Hamburg, as ship's agents to collect the freight payable by Gleichmann under the bill of lading, and on December 15, the ship being then ready to discharge her cargo, Gleichmann paid to H. Vogemann of Hamburg 2900*l.*, being the amount of the freight due from him. At that date there was due and owing by the William Brauer Steamship Company to the defendants 242*l.*, being the balance of a half-monthly instalment of hire under the charterparty of November 11, 1901, which had become due on December 9, 1902. On December 16, 1902, the defendants gave notice to H. Vogemann of Hamburg that they claimed to exercise their lien for hire then due, or to accrue due during the discharge, under their charterparty upon the whole freight collected from Gleichmann, which H. Vogemann had not at that time remitted to the plaintiffs, and had not pledged themselves in account to do so. The defendants subsequently claimed to detain so much of the cargo as had not been discharged. This claim was the subject of litigation in the German Courts, with the result that the claim was not sustained.

At noon on December 23 a further instalment of hire amounting to 550*l.* became due to the defendants from the William Brauer Steamship Company, and there was at that date also due to them under their charterparty a sum of 9*l.* 7*s.* 6*d.* for certain wages which the charterers were liable to pay.

The discharge was completed late at night on December 23. On December 24 the defendants withdrew the vessel from the

service of the William Brauer Steamship Company, which at that date was practically insolvent.

In addition to the litigation in Germany already referred to, the defendants, previously to December 23, had commenced an action in the Hamburg Courts against H. Vogemann of Hamburg, claiming 800*l.*, part of the freight in their hands, in which action the present defendants subsequently obtained judgment.

In the present action the plaintiffs claimed 800*l.* as money had and received by the defendants to their use.

J. A. Hamilton, K.C., and *Leck*, for the plaintiffs. The defendants claim to retain the 800*l.* as against the plaintiffs on the ground that they exercised their lien over it for unpaid hire due under the charterparty of November 11, 1901. At the time the defendants gave their notice to H. Vogemann of Hamburg they had lost their lien, because the freight had then been paid by the bill of lading holder to H. Vogemann, who received it as agents for the plaintiffs. A lien on freight for unpaid charterparty hire is lost as soon as the freight reaches the hands of the charterer or his agent: *Tagart, Beaton & Co.* v. *Fisher* (1); *Janentzky* v. *Langridge*. (2) Even if the freight had been paid to the master of the ship instead of to H. Vogemann of Hamburg, the lien would still have been lost, for under clause 9 of the two charterparties the master became the agent of the plaintiffs to receive the freight: *Marquand* v. *Banner*. (3) Further, although clause 19 of the charterparty gave the owners a lien on sub-freights, they could not exercise their lien as against the plaintiffs, between whom and the owners there was no privity. The plaintiffs were the only persons entitled to receive the bill of lading freight.

Carver, K.C., and *Pepys*, for the defendants, H. Vogemann of Hamburg, supported the plaintiffs' case.

Robson, K.C., and *Roche*, for the defendants, the Dene Steam Shipping Company. H. Vogemann of Hamburg were the ship's agents, though appointed by the charterers, and at

(1) [1903] 1 K. B. 391. (2) (1895) 1 Com. Cas. 90.
(3) 6 E. & B. 232.

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the time notice was given to them not to part with the freight they still held it as ship's agents, and the case is for this reason distinguishable from *Tagart, Beaton & Co.* v. *Fisher*. (1) The contract contained in the bill of lading was entered into by the master of the ship as agent for the owners. *Marquand* v. *Banner* (2) was much criticized in *Gilkison* v. *Middleton* (3), and it was there said that the former case could only be upheld on the ground that there the charterparty operated as a demise of the ship: see Carver on Carriage by Sea, 4th ed. s. 155. In the present case the charterparty did not operate as a demise of the ship, and the master remained the agent of the owners. The master could, if he had chosen to do so, have collected the freight himself and have deducted from it the unpaid hire due to the owners, holding the balance, if any, as agent for the sub-charterers. The position of the ship's agents was the same. On the facts the whole of the 800*l.* was due to the owners. There was 242*l.* balance of unpaid hire due on December 9, and 550*l.* which became due on December 23 before the discharge was finished, and the sum of 9*l.* 7*s.* 6*d.* Although the owners withdrew the ship on December 24, the terms of the charterparty preserved their rights. If it be said that the lien could not be exercised for hire payable in advance and not due, it is to be observed that it would have taken at least three weeks for the charterers to redeliver the steamer to the owners, during which time hire would be payable.

Leck, in reply. The failure of the charterer to redeliver the steamer at the specified place would at the most give rise to a claim by the owner for damages. There is no evidence of any damage, and if there were the defendants could have no lien for unliquidated damages: *Gray* v. *Carr* (4); *M'Lean* v. *Fleming*. (5) The defendants were not entitled to claim payment of hire for any period subsequent to December 24, the date on which they withdrew the ship from the service of the charterer. The utmost, therefore, that the defendants are entitled to retain out of the 800*l.* is the 242*l.* and the 9*l.* 7*s.* 6*d.*

(1) [1903] 1 K. B. 391.
(2) 6 E. & B. 232.
(3) (1857) 2 C. B. (N.S.) 134.
(4) (1871) L. R. 6 Q. B. 522.
(5) (1871) L. R. 2 H. L., Sc. 128.

As to the balance there is no defence. [He referred to *Turner* v. *Haji Goolam Mahomed Azam.* (1)]

Cur. adv. vult.

March 14. CHANNELL J. In this case the plaintiffs claim to recover from the defendants, the Dene Steam Shipping Company, the sum of 800*l.* as money had and received to the plaintiffs' use. The question arises in this way. The Dene Steam Shipping Company, whom I shall refer to as the defendants throughout this judgment, were the owners of a vessel called the *Ferndene*, which they chartered to Brauer & Co., an American firm, by a time charterparty in the common form, which was not a demise of the vessel, but one which left the possession of the vessel in the defendants through their captain. The charterparty contained the usual clause that the captain, though appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency, and other arrangements, and it provided that "the charterers hereby agree to indemnify the owners from all consequences that may arise from the captain signing the bills of lading or otherwise complying with the same." The charterparty also provided, by clause 19, that "the owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter."

Brauer & Co., as they had power to do under their charter with the defendants, sub-chartered the vessel to the plaintiffs, and by an arrangement between the plaintiffs and one Lennard of New York, who had a contract with a person named Gleichmann for the carriage of certain phosphate belonging to Gleichmann from New York to Hamburg, this phosphate was carried on board the *Ferndene* from New York to Hamburg where the ship discharged, under bills of lading signed by the captain in the ordinary way at a rate of freight which had been arranged by the plaintiffs through Lennard with Gleichmann. The plaintiffs settled a certain sum in account with Lennard, and if everything had gone straight the plaintiffs would have received for their own use the sum of money that Gleichmann

(1) [1904] A. C. 826.

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had to pay for the carriage of his phosphate. But at the date of the arrival of the vessel at Hamburg, Brauer & Co., the original charterers, had become practically insolvent, and that is what led to all the trouble which subsequently arose.

The first question which I have to consider is the question with whom in law was the contract that was made by the bill of lading to carry Gleichmann's phosphate. I have come to the conclusion that it was made with the defendants, the owners of the vessel—that it was their contract. The authority against that is the case of *Marquand* v. *Banner* (1); but that case was commented upon in *Gilkison* v. *Middleton* (2), and it seems to me that *Marquand* v. *Banner* (1) can only be supported on the grounds suggested in *Gilkison* v. *Middleton* (2), namely, that it must be treated as a case in which the charterparty operated as a demise of the ship, the possession and control of the ship being given up to the charterer.

In ordinary cases, where the charterparty does not amount to a demise of the ship, and where possession of the ship is not given up to the charterer, the rule is that the contract contained in the bill of lading is made, not with the charterer, but with the owner, and that will, I think, explain away and accounts for all the difficulties which would otherwise arise as to the existence of the shipowner's lien. When there is a sub-charterparty there is no direct contract between the sub-charterer and the owner, and if the contract in the bill of lading were made, not with the owner, but with the sub-charterer, how is the shipowner's lien to be accounted for as against the holder of the bill of lading? It would be very difficult to deal with the question upon any logical or intelligible footing unless one starts with the proposition that the bill of lading contract is made, as it appears upon its face to be made, with the shipowner. In support of that view there is the high authority of Willes J. in *Gilkison* v. *Middleton* (2), and the opinion of the learned author of a work on this subject. (3)

That being, in my opinion, the legal position with regard to the contract in the bill of lading, I have next to consider

(1) 6 E. & B. 232.
(2) 2 C. B. (N.S.) 134.
(3) See Carver on Carriage by Sea 4th ed. s. 155.

the effect of the clause in the charterparty which provides that the captain, though appointed by the owner, shall be under the orders and direction of the charterer as regards employment and agency, and shall sign bills of lading at any rate of freight that he may be directed by the charterer. Now, although the owner has the right to demand the bill of lading freight from the holder of the bill of lading because the contract is the owner's contract, yet the owner has also, of course, contracted by the charterparty that for the use of his ship he will be satisfied with a different sum, which will also in the great majority of cases be less than the total amount of the bills of lading freights; and, therefore, if the owner were himself to demand and receive the bills of lading freight, as he might do if he chose, he would still have to account to the charterer or the sub-charterer, as the case might be, for the surplus remaining in his hands after deducting the amount due for hire of the ship under the charterparty. Of course, in practice an agent is usually appointed to receive the bill of lading freight, though not necessarily, because the captain may receive it himself; and under this charterparty the captain has to appoint as agent any person whom the charterers may select, which is a very reasonable arrangement, because if the business goes smoothly and the charterparty hire is duly paid, the charterers are the persons really interested in receiving the bill of lading freight. But, if I am right as to the bill of lading contract being with the owner, then it seems to me to follow that the agent appointed to receive the bill of lading freight becomes by the very act of appointment the agent of the shipowner to receive the freight for him, and the agent's receipt binds the shipowner.

Now in this case Messrs. Vogemann of Hamburg were appointed the ship's agents at that port, and I think they were appointed agents for both the charterers and the shipowners, and in their capacity of agents they received a sum of 800*l.*, which was the amount of the bill of lading freight due from Gleichmann. Then the defendants intervened and claimed, first of all, the freight itself, and subsequently they claimed to detain the cargo which had not then been delivered. That

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claim was decided against them in an action in the German Courts because, the freight having been paid, Gleichmann was entitled to have delivery of his goods, and the ground upon which the German Courts so decided was that the receipt of the freight by Messrs. Vogemann, the ship's agents, was in fact the receipt of the defendants. With regard to the defendants' claim to the freight in the hands of the ship's agents, that claim was put forward before the agents had in fact remitted the money to the plaintiffs in New York, or had in any way given them credit for it in account, and in my opinion the defendants had the prior right to receive that freight from the agents, subject to this—that after satisfying the amount of their lien for any sum due for hire or otherwise under the charterparty with Brauer & Co., they would have to account to the plaintiffs for the balance, if any. Vogemann of Hamburg received the money as money for which they were bound to account to the defendants, and, being agents for all parties, their receipt bound all the parties for whom they were agents, and in particular it bound the defendants, and in fact prevented them from exercising their lien upon the goods, which were at that particular time on board the defendants' ship.

Then what are the rights of the parties to this action with regard to the 800*l.*? The plaintiffs seek to recover it as money had and received by the defendants to their use. The money was paid to the ship's agents on December 15. On the following day the defendants made their claim to it, and, although they did not in fact receive it until a later date, I think that for the purpose of this action the money must be dealt with on the footing that it was received by the defendants on December 16. On that date there was due to the defendants from Brauer 242*l.* On December 9 there had become due to the defendants under the time charter a sum of money, being a fortnight's hire payable in advance for the use of the ship down to noon on December 23. Part of that sum had been paid by Brauer, and the 242*l.* was the unpaid balance. In addition to the 242*l.* there was also due to the defendants the sum of 9*l.* 7*s.* 6*d.*, for which they had a lien under the time charterparty.

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I now come to what is to my mind the most difficult question in the case. The discharge of the cargo was finished late on December 23. At noon on that day a further sum of 550*l.* became payable by Brauer under the time charterparty, payment of which would have entitled him to the use of the ship for another half-month from that date. That sum was not due on December 16, though it was accruing due; but it was not a sum payable in respect of any period for which the plaintiffs were in fact using the vessel to earn the bill of lading freights, except in respect of the short period of time—a few hours—after noon on December 23 until the time the vessel was finally discharged later on the same day. It clearly was not due on December 16, the date on which the defendants must be deemed to have received the 800*l.* It is clear law, or, if not, it is clear on the language of this charterparty, that the defendants were only entitled to exercise their lien for sums that were due, not for sums that were accruing due; and therefore on December 16 the plaintiffs could have claimed from the defendants the balance of the 800*l.* after deducting the two sums of 242*l.* and 9*l.* 7*s.* 6*d.*, making together 251*l.* 7*s.* 6*d.*, which was all that was at that time due to the defendants. The defendants could not have claimed to retain the 800*l.* in their hands, because in a few days' time another sum amounting to 550*l.* would become due to them. I therefore come to the conclusion that the defendants are not entitled to retain the balance of the 800*l.* after deducting the 251*l.* 7*s.* 6*d.*

But, even if I am wrong as to this, the defendants can now in any case only assert a right to a very small part of the 550*l.* When that sum did become due at noon on December 23, it was due as a payment in advance, and if it was not paid the defendants were entitled, under the time charterparty, to resume possession of their ship. On December 24 they did in fact retake possession. It is true that the charterparty provides that the right to retake possession was to be without prejudice to their other rights; but I do not think that that would give the owners the right to retake possession in the middle of a half-month, and also to claim the hire for the whole of that period. I think that Mr. Leck was right in

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saying that the consideration had either wholly or partially failed, and that the defendants could only claim hire in respect of that portion of the half-month during which the charterers actually had the use of the vessel. The half-month in question commenced at noon on December 23, and there was only one day's use of the vessel after that time in respect of which the defendants can claim hire, because the discharge was completed late on December 23, and the defendants retook possession of the vessel on December 24. One day's hire, I calculate, would amount to 35*l.*

The position, therefore, appears to be this. The defendants are in my opinion accountable to the plaintiffs for 800*l.*, out of which they are entitled to retain 251*l.* 7*s.* 6*d.*, which leaves a balance of 548*l.* 12*s.* 6*d.* due to the plaintiffs. On the other hand, if I am wrong in holding that the defendants were only entitled to exercise their lien for sums actually due on December 16, then a further sum of 35*l.* must be allowed to the defendants, making the sum recoverable by the plaintiffs 513*l.* 12*s.* 6*d.* If the plaintiffs will abandon the claim to 35*l.* out of the 548*l.* 12*s.* 6*d.* for which I am prepared to give them judgment, and take judgment for the 513*l.* 12*s.* 6*d.* only, they will have the double ground for supporting the judgment.

Judgment for the plaintiffs. (1)

Solicitors for plaintiffs: *Woodhouse & Davison.*

Solicitors for defendants, Dene Steam Shipping Company: *Botterell & Roche.*

Solicitors for defendants, H. Vogemann & Co.: *Woodhouse & Davison.*

(1) The plaintiffs agreed to abandon their claim to the 35*l.* It was also agreed between the parties that 13*l.* had to be deducted from the amount for which the defendants were entitled to exercise their lien, in respect of certain discounts due from the defendants to the charterers. Judgment was, therefore, entered for the plaintiffs for 526*l.* 12*s.* 6*d.*, the plaintiffs to have the costs of the action, the defendants, the Dene Steam Shipping Company, to have as against the plaintiffs the costs of issues necessary to establish their lien for 273*l.* 7*s.* 6*d.*

F. O. R.

In re AINSWORTH, AN UNQUALIFIED PERSON. *Ex parte* THE LAW SOCIETY.

1905
April 3.

Solicitor—Unqualified Person—Acting as a Solicitor—Carrying on Proceeding in Action—Notice of Appearance to Writ—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 2—*Rules of Supreme Court, Order* XII., *r.* 9; *App. A, Pt. II., Form No.* 2.

An unqualified person who gives, as agent for the defendant in an action, the notice of appearance to the writ required by Order XII., r. 9, to be given by the defendant to the plaintiff or his solicitor, is thereby acting in contravention of s. 2 of the Solicitors Act, 1843, which prohibits any unqualified person from "acting as a solicitor" or "carrying on any proceeding" in the superior Courts.

MOTION on behalf of the Incorporated Law Society for a writ of attachment against Henry Ainsworth for contempt of Court in having acted as a solicitor without being duly qualified so to act, contrary to the provisions of 6 & 7 Vict. c. 73, s. 2. (1)

The following facts appeared from an affidavit filed in support of the motion:—

A writ of summons was issued in the Manchester District Registry of the High Court of Justice by Messrs. Lambert & Smith, solicitors for the plaintiffs, in an action *Kirker, Greer & Co.* v. *Greenhalgh*, and a copy of the writ was duly served upon the defendant on August 29, 1904. On September 3,

(1) 6 & 7 Vict. c. 73, s. 2: "From and after the passing of this Act no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person or in his own name, in Her Majesty's High Court of Chancery or Courts of Queen's Bench, Common Pleas, or Exchequer, ... unless such person shall . . . . be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this Act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid."

By s. 26 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), every person who acts as a solicitor contrary to the enactment in s. 2 of 6 & 7 Vict. c. 73, "shall be deemed to be guilty of a contempt of the Court in which the action, suit, cause, matter, or proceeding in relation to which he so acts is brought, had, or taken, and may be punished accordingly."

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AINSWORTH. *In re.* THE LAW SOCIETY, *Ex parte.*

1904, an appearance was entered to the writ by or on behalf of the defendant, the memorandum of appearance being in the proper form and signed by the defendant as "Defendant in person." On the same day Henry Ainsworth, who was an auctioneer and valuer and was at that time engaged in valuing premises belonging to the defendant for him, sent by post to Messrs. Lambert & Smith a notice of appearance which was (omitting formal parts) as follows:—

"Take notice that I have this day entered an appearance at the office of the Registrar of the Manchester District Registry for the defendant Joseph Greenhalgh to the writ of summons in this action.

"The said defendant requires delivery of a statement of claim.

"Dated the 3rd day of September, 1904.

"(Signed) Henry Ainsworth, of 24, Crompton Street, Bury, agent for Joseph Greenhalgh."

Ainsworth filed an affidavit in which he admitted the facts above stated, and said that he regretted exceedingly doing anything which was wrongful and illegal; that he undertook not to offend in any such manner in the future; that he apologized to the Court and undertook, if the Court accepted his apology, to pay the costs incurred by the application.

F. W. Hollams, for the Law Society, brought the above facts before the Court.

Mallinson, for Ainsworth. On the facts before the Court Ainsworth did not act as a solicitor in this matter. A defendant need not attend personally to enter an appearance; he may authorize any third person to deliver for him the memorandum of appearance, and the appearance is good: see *Oake* v. *Moorcroft* (1), decided under the Common Law Procedure Act, 1852, which contains provisions similar to those in Order XII., r. 8, with respect to the mode of entering appearance. If, therefore, Ainsworth could properly enter appearance for the defendant in the action, he was justified in stating in any way that he had done so. Order XII., r. 9, of the Rules

(1) (1869) L. R. 5 Q. B. 76.

of the Supreme Court (1) as to notice of appearance does not conflict with this view. The memorandum of appearance may be signed by an agent of the defendant: see App. A, Pt. II., Form 1.

F. W. Hollams, in reply. Order XII., r. 9, clearly makes the giving of notice of appearance a proceeding in the action, which proceeding can only be carried on by the defendant himself or by his solicitor, or by the agent of the solicitor. The words at the end of the form given shew this. This unqualified person has, therefore, carried on a proceeding in the action within 6 & 7 Vict. c. 73, s. 2, and has thereby rendered himself liable to punishment as for a contempt of Court.

LORD ALVERSTONE C.J. In this case I am of opinion that an offence has been committed, although it may be little more than a technical offence. The view taken by Mr. Ainsworth himself when he made his affidavit is, I think, the true view, notwithstanding the ingenious contention of his counsel that as Mr. Ainsworth would be justified in taking a document to the district registrar in order that an appearance might be entered for the defendant, he was justified in telling the plaintiffs' solicitors, in any form, that he had done so. If he did no more than that, there would perhaps be an answer to this application; but I think more than that was

(1) Rules of the Supreme Court, Order XII., r. 9: "A defendant shall, on the day on which he enters an appearance to a writ of summons, give notice of his appearance (Form No. 2 in Appendix A, Pt. II.) to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either by notice in writing served in the ordinary way at the address for service (which, in the case of a writ issued out of a district registry, must be the address for service within the district) or by prepaid letter directed to that address and posted on the day of entering appearance in due course of post, and shall in either case be accompanied by the sealed duplicate memorandum."

Form 2, App. A, Pt. II., is as follows:—

[Heading.]

"Take notice that I have this day entered an appearance at the Central Office, Royal Courts of Justice [*or* at the office of the registrar of the district registry] for the defendant to the writ of summons in this action.

"[*If statement of claim is required, add*] The said defendant requires delivery of a statement of claim.

"Dated the day of 19 .

"(Signed) of .

"Agent for ,

"Solicitor for the defendant."

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AINSWORTH, *In re.* THE LAW SOCIETY, *Ex parte.*

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done here. Order XII., r. 9, provides for a notice of appearance, and a form of the notice is given. [His Lordship read Order XII., r. 9.] The rule clearly contemplates that giving notice of appearance shall be a step in the action. The document sent as a notice of appearance by Mr. Ainsworth to the plaintiffs' solicitors states that he, Henry Ainsworth, has this day entered an appearance for the defendant Greenhalgh, and that he requires delivery of a statement of claim, and the document is signed by Henry Ainsworth, "agent for Joseph Greenhalgh." I am of opinion that it was intended by rule 9 that the notice should be given either by the defendant himself or by his solicitor, and the intervention of a third person acting for the defendant, and purporting to do that which is taking a step in the action—a step which, where the defendant does not take it himself, could properly only be taken by a solicitor—is, in my view, a contravention of the statute. I agree with Mr. Hollams's contention. I think there was a technical breach of the rule. Under the circumstances of this case, however, it will be sufficient to accept Mr. Ainsworth's expression of regret, and hold him to his offer to pay the costs of this application, making an order accordingly.

KENNEDY J. I am of the same opinion. I think that what Mr. Ainsworth did was "carrying on" a proceeding in the action. The document which he sent to the plaintiffs' solicitors was a document prescribed by the rules and the form, and there is this reason for insisting that the rule should be strictly complied with: When the notice of appearance is sent to the plaintiff or to his solicitor, the person to whom it is sent looks at the signature; and if it is the signature of a person who says he is an agent for the defendant, the plaintiff has neither the assertion of the defendant that an appearance has been entered, nor the assertion of a member of the only other class of person who can, according to the law, represent the defendant in this respect—namely, a responsible solicitor, who, if he asserts falsely, is subject to pains and penalties. A signature by a layman as "agent" for the defendant is not a signature contemplated by the rule, the word "agent" there being used

to cover the case of the person who signs not being the solicitor himself but the agent of the solicitor—not the agent of the defendant. In the present case the plaintiffs in the action only get the signature of a layman without there being any proof that he had the defendant's authority to make the entry of appearance and to send this official document to the plaintiffs' solicitors. It was argued by Mr. Ainsworth's counsel that what Mr. Ainsworth did was merely to notify the plaintiffs' solicitors of the doing of an act which it was permissible for him to do. I cannot accept that argument. No doubt it has been decided that the defendant need not attend personally to enter an appearance; the appearance is good though delivered to the proper officer by a third person; but in that case you have with the appearance the signature of the person who is being sued in the action. I agree with my Lord as to the order which should be made.

RIDLEY J. I agree. It appears to me that, although it is possible for a defendant to enter his appearance properly without doing it in person, yet when you come to deal with Order XII., r. 9, it is necessary either for the defendant personally, or for a solicitor properly authorized to represent him, to give the notice of appearance, and I cannot see that the requirements of the rule are complied with unless that is done.

Order for payment of costs accordingly.

Solicitor for Law Society: *E. W. Williamson.*
Solicitor for Ainsworth: *R. H. Bentley.*

W. A.

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April 6.

THE KING *v.* JUDGE PHILBRICK AND MOREY. *Ex parte* EDWARDS.

County Court—Jurisdiction—Distress for Poor-rate—Reasonable Charges for taking, keeping, and selling—Action to recover Excess—Distress (Costs) Act, 1817 (57 *Geo.* 3, *c.* 93), *ss.* 2, 4—*Distress (Costs) Act*, 1827 (7 *&* 8 *Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 *&* 13 *Vict. c.* 14), *s.* 1.

Where a bailiff in distraining for a poor-rate has retained out of the amount realized by the sale of the distress an unreasonable charge for the taking, keeping, and selling of the distress, the remedy of the person aggrieved is not confined to an application to justices for an order under s. 2 of the Distress (Costs) Act, 1817. The county court has jurisdiction to try an action in which repayment is claimed of so much of the charge as is unreasonable.

RULE NISI to the judge of the county court of Dorsetshire holden at Bridport to hear and determine an action.

On February 26, 1904, a summons was issued by justices requiring one Edwards to shew cause why he had not paid 1*l.* 0*s.* 3*d.*, being the amount for which he had been assessed and rated to the relief of the poor. On March 1 the justices issued their warrant to levy a distress upon the goods of Edwards for the sum of 5*s.* 7*d.* (part of the sum of 1*l.* 0*s.* 3*d.*), and also for the sum of 3*s.* 6*d.* for the costs and expenses of obtaining the warrant, and for a further sum for the reasonable charges of the taking, keeping, and selling the distress. A certificated bailiff named Morey executed the warrant by taking a gold watch and a gold brooch the property of Edwards in satisfaction of the distress. These goods were put up for sale by auction and realized 2*l.* 4*s.*, out of which sum Morey retained 1*l.* 18*s.* 7*d.*, being as to 5*s.* 7*d.* the amount of the rate unpaid, 3*s.* 6*d.* the costs and expenses of obtaining the warrant, and 1*l.* 9*s.* 6*d.* charges for the taking, keeping, and selling of the distress (including in the last sum 17*s.* 6*d.* for the removal, storage, keeping possession, and delivery at sale-yard, including haulage, &c.).

Edwards commenced an action in the Bridport County Court against Morey, claiming repayment of 12*s.* 6*d.* on the ground

that the charges making up the sum of 1*l.* 9*s.* 6*d.* were to that extent unreasonable and excessive.

The county court judge declined to hear the case on the ground that the question of the reasonableness of the charges was a question to be determined by the justices who had issued the warrant, and that he had no jurisdiction to hear or determine the action until the justices should have decided that the charges were excessive and unreasonable.

Edwards thereupon obtained the present rule.

J. R. Randolph, for Morey, shewed cause. The result of the decision in *Headland* v. *Coster* (1), overruling *Hill* v. *Pannifer* (2), is that the Distress (Costs) Act, 1817, as applied to the recovery of poor-rates by the Distress (Costs) Act, 1827, is still in force, and the procedure prescribed by s. 2 of the Act of 1817, namely, an application to justices for an order for the payment of treble the amount of the excess, is that which ought to have been adopted by the plaintiff. It is a well-established principle that where a statute prescribes a particular remedy, that is the only one which can be put in force: *Reg.* v. *Registrar of Joint Stock Companies* (3); *Barraclough* v. *Brown.* (4) There was, therefore, no jurisdiction to try this action in the county court.

R. M. Montgomery, for Edwards, in support of the rule. The Act of 1817 has no application to this case. The cause of action is that the charges for taking, keeping, and selling the distress were unreasonable, and therefore contrary to s. 1 of the Distress for Rates Act, 1849. The question to be determined is whether or not the charges were reasonable. That is not a question which justices have any power to determine on an application under s. 2 of the Act of 1817, but is one to be decided in the ordinary way by an action at law. Further, even if the Act of 1817 does apply, the procedure of s. 2 is not exclusive. The Act 27 Geo. 2, c. 20, of which the Act of 1849 is a re-enactment, by s. 2 empowered the officer making a distress to deduct the reasonable charges of taking, keeping,

(1) [1905] 1 K. B. 219.
(2) [1904] 1 K. B. 811.
(3) (1888) 21 Q. B. D. 131.
(4) [1897] A. C. 615.

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and selling such distress, but the Act gave no power to justices to ascertain such charges; "therefore it seemeth that the officer executing the warrant shall be the sole judge thereof in the first instance; and afterwards, if the owner of the goods distrained shall be dissatisfied, the reasonableness thereof shall be determined by a judge and jury upon an action brought": see Burn's Justice, 29th ed. vol. ii. p. 326. Then the Act of 1817, having by s. 2 given justices power to deal with cases in which the schedule costs have been exceeded, by s. 4 expressly reserves to a person aggrieved by a distress, or by any costs or charges in respect of the same, any legal or other suit or remedy which existed before the passing of the Act.

In *Nott* v. *Bound* (1) Blackburn J. pointed out that a bailiff might be liable to be made to refund, by an action in the county court, charges which were unnecessary. It is remarkable that, if the contention now put forward for the defendant is right, the point was never taken, as it might have been, in *Headland* v. *Coster*. (2)

Randolph replied.

LORD ALVERSTONE C.J. Since the decision of the Court of Appeal in *Headland* v. *Coster* (2) it must be taken that as regards poor-rates all the provisions of the Act of 1817 are still in force, and if that Act had created a special statutory remedy for the particular grievance complained of in this case there is abundant authority that that special remedy is the only one open to the person aggrieved. But if the Act of 1817 is considered, I think it is plain that it was not intended to interfere with other rights of action, because s. 4 provided that "It shall be lawful for such justice, if he shall find that the complaint of the party or parties aggrieved is not well founded, to order and adjudge costs not exceeding twenty shillings to be paid to the party or parties complained against, which order shall be carried into effect, and levied and paid in such manner and with like power of commitment as is hereinbefore directed as to the order and judgment founded on such original complaint; Provided always, that nothing

(1) (1866) L. R. 1 Q. B. 405. (2) [1905] 1 K. B. 219.

herein contained shall empower such justice to make any order or judgment against the landlord for whose benefit any such distress shall have been made unless such landlord shall have personally levied such distress; Provided always that no person or persons who shall be aggrieved by any distress for rent or by any proceedings had in the course thereof or by any costs and charges levied upon them in respect of the same shall be barred from any legal or other suit or remedy which he, she, or they might have had before the passing of this Act."

By the Act of 1827 the provisions of the Act of 1817, including those of s. 4, were extended to poor-rates and a number of other rates. The opinion of Blackburn J., as expressed in *Nott* v. *Bound* (1), seems to have been that the right of applying to justices under s. 2 of the Act of 1817 in the case of excessive charges in levying a distress did not oust any other remedy that might exist. In that case proceedings were taken under s. 2 against a bailiff for deducting higher charges than were permitted by the schedule to the Act. The case was decided in favour of the bailiff on the ground that he had done nothing which rendered him liable to be proceeded against under s. 2; but the learned judge went on to say that the bailiff might "be liable to be made to refund by an action in the county court charges which were unnecessary or not strictly lawful, but he is not liable to the treble penalty." In that judgment Shee J. concurred. Although those observations may not have been absolutely necessary to the decision, they are in favour of Mr. Montgomery's contention, and it was an opinion upon a matter which certainly had to be considered by the learned judge, because he was dealing with what the rights and remedies were against the bailiff under the Act of 1817. I also think that Mr. Montgomery is entitled to rely upon what I may call the effect of the authority in the case of *Headland* v. *Coster* (2), where the action had been brought in the county court, and the Court of Appeal, overruling the decision of this Court in *Hill* v.

(1) L. R. 1 Q. B. 405. (2) [1905] 1 K. B. 219.

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Pannifer (1), at any rate treated the action as lying, and decided that in that action the plaintiff was entitled to recover such amounts as were in excess of the charges under the Act of 1817. The Court of Appeal had to consider the provisions of the Act of 1817, and the Court must, I think, have taken the view either that the power to proceed by way of an application to justices under s. 2 was not of itself sufficient to deprive the plaintiff of his right to recover in an action an unreasonable amount, either above or below the sum fixed by the schedule, which he had alleged had been charged against him, or, more probably, that that right was reserved by the provisions of s. 4; and the fact that the learned counsel who argued that case for the respondents did not take the point that the county court had no jurisdiction to try the case does not weaken the argument now advanced on behalf of the plaintiff.

Having regard to the language of s. 4 and to the judgment of Blackburn J. in *Nott* v. *Bound* (2), and to the proceedings in the Court of Appeal, I am of opinion that we ought to hold that the county court judge had jurisdiction, and ought to have maintained the action in respect of which this rule has been moved. I think, therefore, the order must be made absolute for the county court judge to hear and determine the case.

KENNEDY J. I agree.

RIDLEY J. I agree.

Rule absolute.

Solicitors for defendant: *Bisgood & Marshall, for Austen Whetham, Bridport.*

Solicitors for plaintiff: *Lloyd-George, Roberts & Co., for Bowen & Symes, Weymouth.*

(1) [1904] 1 K. B. 811.

(2) L. R. 1 Q. B. 405.

F. O. R.

BARR, MOERING & CO., APPELLANTS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY, RESPONDENTS.

1905
April 7.

Railway Company—Carriage of Goods—Rates and Charges—Intent to avoid Payment of "Tolls"—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 98, 99.

The appellants brought to the respondents' goods station three cases of goods for the purpose of having them carried by the respondents on their railway, and delivered to the respondents' servant consignment notes in which the goods had been misdescribed by the appellants with the object of procuring the carriage of the goods at a lower rate than would have been charged if they had been correctly described. No express demand was made by the respondents' servant for an account of the goods, but by the course of business known to the appellants the goods would not have been received by the respondents if consignment notes had not been delivered. The appellants were charged, under ss. 98 and 99 of the Railways Clauses Act, 1845, with giving a false account of the goods with intent to avoid the payment of the tolls in respect thereof, and convicted:—

Held, that ss. 98 and 99 apply to cases where the railway company are themselves acting as carriers; that the conviction was right, because, assuming that it was necessary to prove that there had been a demand for an account, there was evidence on which the magistrate could find that there had been a demand.

But, *quære*, whether, where a false account is delivered, it is necessary to prove a demand.

CASE stated by a metropolitan magistrate.

Three informations were preferred by the respondents against the appellants under the Railways Clauses Act, 1845, ss. 98 and 99 (1), charging the appellants for that they, on

(1) Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 98: "Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls, at the places where he attends for the purpose of receiving goods or collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to be unloaded or taken off the railway; and if the goods

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July 7, 1904, at Broad Street goods station, being the persons having the care of certain goods, to wit, leather goods, brushes, and toys, passing upon and being on the London and North Western Railway, did unlawfully give to the respondents' collector of tolls a false account of the said goods with intent thereby to avoid the payment of tolls in respect of the said goods contrary to the statute.

Upon the hearing of the information the following facts were proved or admitted. The appellants had for many years carried on business as carriers and as agents for importers of goods from the Continent, and had for many years sent goods for conveyance by the respondents' railway. The practice of the parties in these transactions was as follows: The appellants made out consignment notes containing (inter alia) the description of the goods sent, and delivered the notes by their carmen to the respondents' servants at the goods station where the goods were received for conveyance. Unless consignment notes duly filled up were sent the respondents declined to receive the goods for conveyance, and this fact was well known to the appellants. The rates charged by the respondents for the conveyance of goods varied in amount according to the nature of the goods conveyed, as the appellants knew. On many prior occasions on which the respondents had complained of goods being misdescribed in consignment

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conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls."

Sect. 99: "If any such owner or other such person shall fail to give such account, or to produce his way-bill or bill of lading, to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload or take off any part of his lading or goods at any other place than shall be mentioned in such account, with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company a sum not exceeding ten pounds for every ton of goods, or for any parcel not exceeding one hundredweight, and so in proportion for any less quantity of goods than one ton, or for any parcel exceeding one hundredweight (as the case may be) which shall be upon any such carriage; and such penalty shall be in addition to the toll to which such goods may be liable."

notes the appellants had on demand paid a higher rate, or the difference had been mutually arranged between the parties.

On July 7, 1904, the appellants' carman delivered at Broad Street Station three cases containing goods for conveyance by the respondents' railway to Birmingham, and at the same time the carman handed to a servant of the respondents three consignment notes, in all of which, under the heading "article," there was entered the word "hardware." The consignment notes were not signed by the appellants. The goods in the three cases were, in fact, respectively leather goods, brushes, and toys, and the appellants in describing the goods in the consignment notes as "hardware" intended to avoid payment of the rates which to their knowledge the respondents were entitled to charge for the carriage of leather goods, brushes, and toys, which rates exceeded the rate for hardware, and the appellants so described the goods in order to secure their conveyance at a lower rate per ton than if they had been described according to their true description, and the appellants thus gave a false account of the goods.

The respondents had a credit account with the appellants, and in the ordinary course of business the amount due from the appellants for the conveyance of the cases to Birmingham was entered in the respondents' books in accordance with the consignment notes as if the cases had contained hardware, and an account containing the entries and the charges was afterwards delivered to the appellants.

The three cases were in the ordinary course conveyed to Birmingham, and it was there discovered by the respondents that none of the cases contained hardware.

On behalf of the appellants it was contended that under ss. 98 and 99 of the Railways Clauses Act, 1845, the appellants were not liable to any penalty unless the respondents had first, in accordance with the said sections, made a demand upon the consignor for an account of the goods, and that the respondents in the present case had made no such demand, and that the informations should therefore be dismissed.

On behalf of the respondents it was contended—(1.) that as regards the offences alleged in the informations it was not

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necessary for the railway company to make any such demand; and (2.) that, if any such demand was necessary, the fact (in accordance with the well-known practice and well known to the appellants) that the goods would not have been received by the respondents unless a consignment note containing the necessary particulars had been handed to the respondents with them constituted a sufficient demand within the meaning of the sections.

The magistrate was of opinion that it was necessary that a demand should be made for the account, and that no specific demand had been made in either of the three cases; but he was further of opinion that the demand was satisfied by the general requirements, according to the ordinary course of business, that the consignors should hand to the respondents the consignment notes, stating, amongst other particulars, what the cases contained, and that the delivery by the appellants and the taking by the respondents of the consignment notes under the circumstances mentioned shewed that a demand had been made by the respondents sufficient to comply with the requirements of the statute. The magistrate, therefore, held that a demand had been made, and he convicted the appellants.

The questions of law for the opinion of the Court were—(1.) whether it was necessary for the respondents to prove that they had made a demand for the account of goods delivered to the respondents; and (2.) if a demand was necessary, whether in the circumstances the magistrate was right in holding that the respondents had made a demand for the account sufficient to comply with the requirements of ss. 98 and 99.

Danckwerts, K.C. (*Kays* with him), for the appellants. The magistrate rightly held that before the offence under s. 99 of the Railways Clauses Act, 1845, is complete there must have been a demand for an account; but he was wrong in holding that there had in this case been a demand. It is not alleged that there was an express demand, but it is said that, looking at the course of business between the parties and all the circumstances of the case, there was an implied demand for an

account. Even if that were so, it was not a demand which satisfies the requirements of the statute. Under s. 98, when the goods are on the railway the company may demand an account, which is to be signed by the owner, stating the number or quantity of the goods; and under s. 99, if that account is not given or if the account which is given is false an offence is committed. In the present case the goods were not on the railway at the time the demand is alleged to have been made; the consignment notes handed to the railway company were not signed by the respondents, and the false statement in the consignment notes did not relate to the number or quantity of the goods, but to their description, which is not a matter required by s. 98 to be inserted in the account. Therefore this was not a false account within the meaning of s. 99. There was no failure to deliver an account, because there cannot be a failure without a previous demand made at the time indicated in s. 98, i.e., when the goods are on the railway.

Further, in any event there was no offence committed in this case, because ss. 98 and 99 have no application to cases where the railway company is itself the carrier of the goods. These sections form part of a group of sections commencing with s. 86, in which the word "tolls" is used in its strict technical sense, that is, a payment for the conveyance of goods on a railway in a truck or carriage belonging to the owner of the goods, or to a carrier other than the particular railway company, as was contemplated would be the course of business in the early days of railways, whereas when the railway company itself acts as carrier on its own lines the technical term for the payment to be made is rates and charges: see, for example, s. 92, which refers to tolls for the use of the railway, and charges for the carriage of passengers and goods. In *Brown* v. *Great Western Ry. Co.* (1) it was held that the tolls referred to in s. 95 do not include charges made by a company for carrying passengers in the carriages of the company; and in *Wallis* v. *London and South Western Ry. Co.* (2) the same restricted meaning was given to the word tolls in s. 97; and it is submitted the word must bear the same meaning in ss. 98 and 99.

(1) (1882) 9 Q. B. D. 744. (2) (1870) L. R. 5 Ex. 62.

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The opening words of s. 98 clearly do not refer to the case of the railway company itself being the carrier; it may be contended that the later words, "brought for conveyance," are capable of meaning goods brought for conveyance in the railway company's trucks; but the following words, "as aforesaid," shew that what is meant is goods brought for conveyance in trucks not belonging to the railway company, but to some one else. The later part of the section is dealing with the same circumstances as the earlier, and applies to cases where there is one consignment of different kinds of goods. The use of the words way-bill and bill of lading in s. 99 support this view; for these words are quite inappropriate if the railway company is the carrier, since the owner of the goods would not in that case have a way-bill or bill of lading. [He also referred to *Peebles* v. *Caledonian Ry. Co.* (1)]

Shearman, K.C., and *J. P. Grain*, for the respondents, were not called upon to argue.

LORD ALVERSTONE C.J. I have no doubt whatever that the decision of the magistrate in this case was right. The appellants, being the persons having the care of goods, knowingly gave a false account to the railway company for the purpose of getting the goods carried at a lower rate. I doubt whether it is necessary to prove any demand for an account in a case in which a false account has been actually tendered; but in the present case the magistrate has found as a fact that the goods would not have been received by the railway company unless the consignment note had been delivered with them. There was therefore what is really an implied demand, and I agree with the view taken by the magistrate that that was a sufficient demand to satisfy the requirements of ss. 98 and 99. For reasons which I will state in a moment, it is not in my opinion necessary that the goods shall be on the railway at the time when the false account is given.

It was further contended on behalf of the appellants that the conviction was wrong on the ground that the word "tolls" in ss. 98 and 99 is used in what may be called its limited

(1) (1875) 2 R. 346.

meaning, and does not apply to cases where goods are to be carried by the railway company as carriers. These two sections form part of a group of sections, Nos. 86 to 107, and no doubt in some of the sections the word "tolls" is used in the limited sense, while in others a more extended meaning must be given to the word, and I refer also to the interpretation clause (s. 3), which shews that the word "tolls" may be used in the wider sense as including any rate or charge payable for goods conveyed on the railway. I agree also with Mr. Danckwerts that "rates and charges" is the technical expression which was ordinarily used before 1845, and since, with regard to the carriage of goods by a railway company. The question which we have to consider is whether the word "tolls" in ss. 98 and 99 applies only to the case of persons using a railway for the carriage of their goods in their own wagons or trucks, or of one railway company running their trucks over the lines of another company under running powers or by agreement. It would be curious if these sections were thus limited; but that, of course, would be no answer if the point is made good. What are the words of s. 98? "Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls at the places where he attends for the purpose of receiving goods": I pause there to point out that, if the word "tolls" is to have the limited meaning contended for, the man who collects the tolls never does receive the goods at all. He might possibly in some cases be said to receive the truck containing the goods, but even that would be giving the words a somewhat strained construction; but in a case where one railway company runs its own engine and trucks over the lines of another company under the running power clause, it is not true to say that the collector of tolls receives even the truck. Therefore it is quite plain to my mind that the opening words of s. 98 contemplate a case in which the person going to collect the money receives goods which are brought for the purpose of their being carried by the railway company. But the other words of the section confirm this view. The owner of the goods is to give "an exact account

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in writing signed by him of the number or quantity of goods conveyed by any such carriage." I quite agree that the words "conveyed by any such carriage" are mainly applicable to the case of a person bringing a truckload of what is called mixed consignments of goods. But when one comes to the concluding words of the section the meaning of the earlier words is made still more clear. They are: "and if the goods conveyed by any such carriage or brought for conveyance as aforesaid be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls." That in my opinion clearly points to the position of a person who brings goods for conveyance which are liable to different tolls, meaning thereby different rates of charge. A point was taken by Mr. Danckwerts that under these words all the information that the railway company are entitled to demand by the account is the number or quantity of the goods, that there is no obligation to give a description of the character of the goods, and that therefore the false description of these goods in the consignment notes was mere surplusage. In my opinion that is not the meaning of the words. If the consignment was a mixed parcel, a statement that there were so many barrels and so many cases without specifying the contents would not inform the company whether the goods were liable "to each or any of such tolls." Therefore, not only the number or quantity, but also the character of the goods must be stated, though of course this would apply to tolls in the narrower sense, because tolls vary according to the character of the goods as well as rates and charges. In my opinion s. 98, when construed fairly and reasonably, is one of the sections in this group in which the word "tolls" is not used in the narrower sense contended for by Mr. Danckwerts, though there are no doubt some sections in which the word is used in that sense only—for example, s. 94, the milestone clause; and the same thing must be said of s. 97, having regard to the decision in *Wallis* v. *London and South Western Ry. Co.* (1) But I wish to add with regard to that case, that though it is a binding

(1) L. R. 5 Ex. 62.

authority on us in this Court, with regard to s. 97, I do not think the decision has any application to s. 98; and if the same point were to come up for decision in the Court of Appeal the question will have to be considered whether the decision in *Wallis's Case* (1) was right. I have dealt with this argument as to the meaning of the word "tolls" in s. 98, though the point was not taken before the magistrate; but as the question is one of law which arises on the facts stated in the case we should, if the point had been a good one, have given effect to it. (2)

In my opinion this appeal must be dismissed.

KENNEDY J. I am of the same opinion, and I confess that, with all deference to the interesting and ingenious argument which we have heard, this seems to me to be a very clear case. The subject of the proceedings against the appellants was the dishonest sending of goods by rail under a misdescription, the object being to pay a less sum for the carriage of the goods than would have had to be paid if the goods had been correctly described. The point which was raised at the hearing as appears from the case was that, whereas ss. 98 and 99, which create the offence, require that there shall be a demand for the account, the prosecution had failed to prove that there had been any demand which the magistrate was entitled to treat as satisfying the requirements of the statute. The magistrate held that a demand was necessary, and that in the circumstances of the case there had been a sufficient demand, because, according to the usage of business well known to the appellants, the railway company required the production of an account similar to that which is here impeached before the goods would be accepted for carriage. With regard to the question as to the necessity for a demand, I have no doubt that where proceedings are taken against a person for failing to give an account, it would then be necessary to prove a previous demand, because it would be most unreasonable and unjust that the mere failure to deliver an account should render a person liable to a penalty if there had been no

(1) L. R. 5 Ex. 62. (2) See *Knight* v. *Halliwell*, 1874) L. R. 9 Q. B. 412.

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request for it. But s. 99 goes on to say, "or if he gives a false account"; and, speaking for myself, I am not prepared to say that, where a false account is in fact delivered, the offence is not complete without proof of a previous demand; it seems to me unreasonable to say that there must be an express demand, if the necessity, or indeed the opportunity, for it is taken away by the act of the person bringing the goods to the railway company, as it is when, without waiting to be asked for an account, he says, in effect, "Here is the account required by law." To say that in that case, if the account proves to be false, the absence of a demand would prevent the man from becoming liable to a penalty under s. 99 is to my mind to give an unreasonable construction to the section, and one not warranted by its language.

With regard to s. 98, it seems to me that it would have been difficult to find words which more aptly apply to the circumstances of this case. This section speaks of the collector of tolls attending at a place for the purpose of receiving goods, of the goods brought for conveyance, and refers to the possibility of the goods being liable to pay different tolls. The interpretation clause says that the expression "tolls" shall include rates and charges, and, although there may be some sections in which the word is used in a narrow sense, I think that these expressions found in s. 98 are just as applicable to the case of goods which are to be conveyed by the railway company as carriers as to the case of the sender using his own trucks for the purpose of conveying the goods. I think that it is impossible to say that the account referred to in ss. 98 and 99 is required only for the proper adjustment of tolls proper; it is equally required in the case of the payment of rates and charges for the carriage of goods by the railway company.

For these reasons I am of opinion that the conviction in this case was right.

RIDLEY J. I am of the same opinion. With regard to the finding of the magistrate that a demand was necessary, I am not satisfied that in the events which happened in this case,

where the appellants have given a false account, it was necessary to prove a specific demand. I am not prepared to say that I agree with the decision of the magistrate on that point. On the other points I agree with the judgments which have been given, and I do not think that I can usefully go over the ground again.

Appeal dismissed.

Solicitors for appellants: *Goldberg, Barrett & Newall.*
Solicitor for respondents: *C. de J. Andrewes.*

F. O. R.

[IN THE COURT OF APPEAL.]

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March 28.

HERMANN *v.* CHARLESWORTH.

Contract—Illegality—Marriage Brokage—Introductions with a view to Marriage — Contract for Reward to bring about Introductions — Expense incurred in carrying out Contract—Rescission of Contract—Recovery of Money paid.

A contract for reward to introduce another to persons of the opposite sex, with a view to marriage with one of those persons, is a marriage brokage contract and illegal; and money paid under such a contract can be recovered back by the person who paid it, although the other party to the contract has brought about introductions, and has incurred expense in so doing.

Decision of the Divisional Court, reported [1905] 1 K. B. 24, reversed.

APPEAL from the judgment of a Divisional Court, reported [1905] 1 K. B. 24, on an appeal from the decision of the judge of the Westminster County Court.

The action was brought to recover back a sum of money paid by the plaintiff to the defendant, who was the proprietor of a paper known as *The Matrimonial Post and Fashionable Marriage Advertiser*. In the early part of September, 1903, the plaintiff, Miss Hermann, a lady of thirty-three years of age, in consequence of an advertisement that she had seen in the defendant's paper, had an interview with the defendant, and signed an agreement in the following terms: "In consideration of being introduced to or put in correspondence with a gentleman through the influence of the proprietor of the paper

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entitled *The Matrimonial Post and Fashionable Marriage Advertiser*, and in the event of a marriage taking place between such gentleman and myself, I hereby agree to pay to the said proprietor the sum of 250*l.* on the date of my said marriage." The plaintiff also entered into a verbal agreement with the defendant to pay him, as a "special client's fee," the sum of 52*l.* A cheque for 52*l.* was accordingly sent to the defendant, and acknowledged by him in the following terms: "I beg to acknowledge the receipt of 52*l.*, less 47*l.* to be returned in nine months should no engagement or marriage take place within that period." The defendant introduced the plaintiff to several gentlemen, and interviewed and wrote to others on her behalf, but no marriage or engagement followed, and in January, 1904, the plaintiff brought an action in the High Court to recover back the 52*l.* as money paid by her as the consideration for a marriage brokage contract. The action was remitted to the county court. The county court judge held that the contract under which the money was paid was a marriage brokage contract, and as such was illegal and void, but that the parties were not in pari delicto, the defendant being the more culpable as having instigated the making of the contract for purposes of profit to himself, and that, as the plaintiff had repudiated the contract before the illegal purpose of procuring an engagement of marriage had been carried into effect, she was entitled to recover back the money. Judgment was accordingly given for the plaintiff.

The defendant appealed, and the judgment of the Divisional Court (Lord Alverstone C.J., Kennedy J., and Ridley J.) was delivered by Kennedy J. (1) in favour of the defendant.

The plaintiff appealed.

Duke, K.C., and *Compton-Smith*, for the plaintiff. The county court judge was right in holding that the contract in this case was one of marriage brokage. In principle there is no distinction between a contract undertaken for reward to bring about a marriage with some person or other not named and such a contract relating to a particular person. In either

(1) [1905] 1 K. B. 24.

case the contract relates to the bringing about of a marriage, and the general contract would end if successful in the selection of a particular person. The law as to such contracts is the same in either case, and is expressed in the notes to *Scott* v. *Tyler* in 1 White and Tudor's Equity Cases, 7th ed. p. 573: "In another respect our Courts have not followed the civil law, by which proxenetæ of the Roman law, or match-makers, were allowed to stipulate for a reward not exceeding a certain amount, for promoting marriages; for it has been held in equity, from a very early period, that all contracts or agreements for promoting marriages for reward (usually termed marriage brokage contracts) are utterly void." The generality of this statement is borne out by numerous cases. It is true that in particular cases the ground for setting aside such a contract has been stated to be that they tend to corrupt persons having some influence or control over the parties, or, as in *Drury* v. *Hooke* (1), that it may be called "a sort of kidnapping," but the statement of a particular objection is not inconsistent with a general objection to all such contracts. In *Arleston* v. *Kent* (2) there is a short note to the effect that bonds entered into for procuring a marriage were cancelled. In *Arundel* v. *Trevillian* (3) the Court, upon reading precedents, decreed that a bond given by the plaintiff for money promised by the plaintiff to the defendant for effecting a marriage between the plaintiff and his then wife should be cancelled. It is noticeable that there were even then precedents and that the marriage had taken place. In *Hall* v. *Potter* (4) it was said that marriages ought to be procured by the mediation of friends and not of hirelings, and a decision in favour of the validity of a bond was reversed in the House of Lords. In the note to *Roberts* v. *Roberts* (5) a number of authorities are collected, and in the case itself Sir Joseph Jekyll treated the relief against all marriage brokage bonds as the established practice of the Court of Equity. In *Cole* v. *Gibson* (6) Lord Hardwicke directed an

(1) (1686) 1 Vern. 412.
(2) (1619) Toth. Cas. p. 27 (ed. 1820).
(3) (1635) 1 Rep. Ch. 3rd ed. p. 47.
(4) (1695) Show. P. C. 4th ed. p. 98; 3 Lev. 411.
(5) (1730) 3 P. Wms. 66.
(6) (1750) 1 Ves. Sen. 503.

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issue to be tried to determine whether the bond was given for assisting the plaintiff, who asked for relief, in his marriage, or for some other consideration. *King* v. *Burr* (1) was an action to recover the expenses of entertainments given by the plaintiff under an agreement with the defendant to introduce him to a woman of fortune with a view to marriage. A bill of discovery in support of the action was demurred to, and a demurrer to the bill was allowed by Lord Eldon. There is, therefore, a line of authorities for two centuries in support of the proposition that the Courts will set aside any contract of marriage brokage.

Some of the authorities already cited shew that although the person to whom the promise has been made has performed his part of it, and even although a marriage has taken place, the Courts will not assist him, and will go as far as to permit the recovery of money that has been paid, as in *Smith* v. *Bruning*. (2) The case for the plaintiff may be put on the ground that she deposited 52*l*. with the defendant to abide the result of an event which did not happen. The defendant was a stakeholder, and the whole amount placed in his hands can be recovered by the plaintiff on her repudiating the arrangement made. It makes no difference that she was one of the parties to the contract, for that was the case in *Strachan* v. *Universal Stock Exchange* (3), *Barclay* v. *Pearson* (4), and a number of other cases. The plaintiff does not rely upon an illegal contract, for she repudiated it before the event contemplated, that is a marriage, happened; so that no question arises as to the parties being in pari delicto.

[They cited also *Tappenden* v. *Randall* (5); *Aubert* v. *Walsh* (6); *Hastelow* v. *Jackson* (7); *Taylor* v. *Bowers* (8); *Wilson* v. *Strugnell*. (9)]

M. Lush, K.C., and *Schiller* (with them *Arthur Page*), for the defendant. There are two matters to be considered—whether the agreement in this case can be treated as a marriage

(1) (1810) 3 Mer. 693.
(2) (1700) 2 Vern. 392.
(3) [1895] 2 Q. B. 329.
(4) [1893] 2 Ch. 154.
(5) (1801) 2 Bos. & P. 467; 5 R. R. 662.
(6) (1810) 3 Taunt. 277; 12 R. R. 651.
(7) (1828) 8 B. & C. 221; 32 R. R. 369.
(8) (1876) 1 Q. B. D. 291.
(9) (1881) 7 Q. B. D. 548.

brokage contract, and whether, assuming it to be so, it is illegal. On the assumption that the contract was illegal the plaintiff, as a party to it, cannot recover back the money she has paid. The rule is that if a plaintiff in order to establish his case has to rely upon, or call in aid, an illegal transaction or an illegal consideration to which he himself is a party, he cannot recover simply on a total failure of consideration: *Simpson* v. *Bloss* (1); *Taylor* v. *Chester* (2); *Herman* v. *Jeuchner* (3); *Scott* v. *Brown, Doering, M'Nab & Co.* (4) It is true that it has been held that where nothing has been done in furtherance of an illegal contract by way of part performance of it money paid under it is recoverable as money paid without consideration, but money paid under an illegal contract which has been wholly or partially executed cannot be recovered: *Kearley* v. *Thomson* (5); *Lowry* v. *Bourdieu.* (6) In this case there was part performance of the contract by giving introductions which might have resulted in marriage. *King* v. *Burr* (7), on which the plaintiff relies, is only an authority for the proposition that where the contract is illegal the parties will be left in statu quo. On the assumption of illegality it is submitted that the plaintiff cannot recover back the money that she has paid.

Secondly, the contract was not a marriage brokage contract. One element of a marriage brokage contract is that it is directed to the procuring of marriage with a particular person. In this case the contract was to effect introductions to a number of persons among whom choice of a husband might be made, and was in no sense a contract to procure a marriage. The cases shew that the Courts regard with disfavour a contract, for a pecuniary consideration, to bring about a marriage with a particular person: *Cole* v. *Gibson* (8); *Hall* v. *Potter* (9); but that cannot apply where the party seeking assistance to marry has a discretion the exercise of which is left quite free and open. *Drury* v. *Hooke* (10) was decided on the ground that the

(1) (1816) 7 Taunt. 246; 17 R. R 509.
(2) (1869) L. R. 4 Q. B. 309.
(3) (1885) 15 Q. B. D. 561.
(4) [1892] 2 Q. B. 724.
(5) (1890) 24 Q. B. D. 742.
(6) (1780) 2 Doug. 468.
(7) 3 Mer. 693.
(8) 1 Ves. Sen. 503.
(9) Show. P. C. 4th ed. p. 98.
(10) 1 Vern. 412.

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young woman's parents were living, and that there was a material difference between that case and cases in which the parties were at their own disposal. So in *Hamilton* (*Duke of*) v. *Lord Mohun* (1) the objection was to tampering with a person who had power to advise, and bribing her to exercise her influence in one way. In *Keat* v. *Allen* (2) the objection was of a similar character, turning on duress. The elements of duress or coercion, the exercise of influence for a money consideration, the tampering with a person who is in a position to advise, and the promotion of a marriage with a particular person, are absent in this case, and there is nothing in the contract tending to corrupt public morals. The contract, on the face of it, was merely to give introductions, and the plaintiff was free to make her choice. It was not a contract to procure a marriage, but for payment for services to be rendered. It may well be that, in a case that can be treated as one of marriage brokage contract, part performance, or the fact that the marriage has taken place, is no bar to an action to recover money paid under the contract. The ground for this would be, to put it shortly, the desire of the Courts to discourage such contracts as opposed to public policy; and such a ground cannot be applicable to a case like the present one, in which none of the evils pointed out in the reported cases could arise.

Duke, K.C., in reply.

COLLINS M.R. This is an appeal from the judgment of the Divisional Court reversing the decision of the county court judge. The circumstances are shortly these: The defendant was a marriage advertising agent. The plaintiff was a lady who was desirous of getting married, and she was attracted by an advertisement in a paper of which the defendant was proprietor, and she got into communication with him. The result was that the defendant undertook to assist her in getting married by means of introductions to gentlemen, and she agreed to pay him 250*l.* in the event of a marriage taking place as the result of the introductions. She also agreed to pay the defendant as a "special client's fee" the sum of 52*l.*,

(1) (1710) 1 P. Wms. 118; 2 Vern. 652. (2) (1707) 2 Vern. 588.

which was sent to him by cheque, the receipt of which the defendant acknowledged in a letter in which he said that 47*l.* was to be returned if no engagement or marriage took place within nine months. The defendant gave her various introductions, but at the end of four months the lady thought better of it and demanded back the money. The county court judge came to the conclusion that the plaintiff was entitled to recover the money on the ground that the contract was a marriage brokage contract, which the law would certainly not assist towards its accomplishment; that it was a contract upon which the law looked with dislike and would assist the party who was induced to enter into it to undo it. The Divisional Court came to the conclusion that the particular arrangement in this case to procure introductions with a view to marriage, giving the lady a choice among the persons introduced to her, was not within the mischief attributed to marriage brokage contracts. As I understand, they took the view that a marriage brokage contract was confined to the case of a contract to procure marriage with one particular person. Going back to the principle on which this branch of the law as to such contracts rests, I am unable to find any ground for that distinction. It seems to me that the principle is as much violated in the class of cases to which the present one belongs as in cases where the contract relates to bringing about a marriage with a particular individual. The principle is clearly stated in *Cole* v. *Gibson* (1), where Lord Hardwicke in his judgment said: "To be sure, this Court has been extremely jealous of any contract of this kind made with a guardian or servant, especially with a servant, in respect of the marriage of persons over whom they have an influence; (and has been justly so; nothing tending more to introduce improper matches) and by rules established, not regarding whether the match is proper or no, if brought about by a marriage-brocage contract, sets it aside; not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation: therefore though a proper match, as it was in *Hall* v. *Potter* (2), yet for the sake of the mischief

(1) 1 Ves. Sen. 503. (2) Show. P. C. 4th ed. p. 98.

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that would be introduced, and to prevent that influence which servants more especially would gain over young ladies, the Court sets it aside: and if that was the nature of the contract, I do not know, that subsequent confirmations have been permitted to stand in the way of the relief sought." I read this latter part because a very material element in this case is the question at what stage the Court will intervene. The Lord Chancellor then considered the facts of the case, and directed issues to determine what was the real consideration on which the claim in that case was founded. The decision is important as shewing that the essence of the mischief aimed at arises, not merely where the contract relates to a particular case, in which the match may or may not be a proper one, but because contracts of this class are against public interest. I can see no distinction in this respect between a contract relating to one particular person and a contract that relates to a whole class. Many elements have no doubt entered into the judgments in different cases, but at the root of the question of the illegality of a marriage brokage contract is the introduction of the consideration of a money payment into that which should be free from any such taint. No doubt, apart from that fundamental objection, other elements may intervene, such as an abuse of the power of influencing possessed by a parent or guardian or other person having that power; but those are illustrations of the mischief, and not the ground on which the principle is founded. The case of *King* v. *Burr* (1) is really indistinguishable from the present one. Cozens-Hardy L.J. has obtained the bill in that case from the Record Office, and the coincidence between the methods employed in 1810, when that case was decided, and at the present time is singular. The plaintiff in that case undertook to procure for the defendant introductions with a view to his marriage with some woman of fortune, and the process of introduction involved considerable expense. The plaintiff brought an action at law to recover the expenses of entertainments given by the plaintiff in carrying out the introductions, and in aid of that action a bill of discovery in Chancery was brought to which the defendant demurred,

(1) 3 Mer. 693.

and the demurrer was allowed. So it appears that the very point raised in this case—the fact of there being a choice given of a number of persons and not merely an effort to bring about marriage with a particular person—was raised and decided in that case on the ground of public policy. In my opinion, both on principle and authority, the transaction in this case comes within the rule which invalidates marriage brokage contracts.

From the point of view that I take there arises a question which it was not necessary to discuss in the Court below. Assuming that the contract was illegal, it has been contended that there has been such part performance of the contract that the plaintiff cannot insist upon having it undone. The principle relied on is that a person allegans suam turpitudinem non est audiendus. It is said that this lady comes to the Court setting up the fact that she was party to an illegal contract and asking for relief, and that she should not be allowed to do so, for though it is true that in modern times persons have been allowed to resile from illegal contracts, they cannot do so if any part of the illegal purpose has been accomplished. Here it is said that the lady has had the benefit of the introductions contracted for, and of the trouble and expense incurred by the defendant, and that it is too late for her to resile from the contract. The answer on behalf of the plaintiff is put on two grounds. First, it is put upon her common law right to recover money deposited to abide the result of an event that has never happened. It is urged that she deposited money with the defendant to be kept by him only on the happening of a certain event, that the object for which she deposited the money was illegal, that in point of law there was no contract, and that it was competent to her to revoke it at any time before the event; that she had revoked it, and was therefore entitled to get back the money that she had paid. For authority on this point I may refer to the judgment of Lord Justice Stirling, then Mr. Justice Stirling, in *Barclay* v. *Pearson*. (1) The learned judge, after considering several cases, referred to the decision of Littledale J. in *Hastelow* v.

(1) [1893] 2 Ch. 154.

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Jackson (1) in these terms: "*Hastelow* v. *Jackson* (1) was an action in which the plaintiff and one Wilcoxon deposited money in the hands of a stakeholder to abide the event of a boxing match between them, and after the battle the plaintiff demanded the whole sum from the stakeholder, and threatened him with an action if he paid it over to Wilcoxon. This he nevertheless did by the direction of the umpire, and it was held that the plaintiff was entitled to recover from him his own stake as money had and received to his use. Mr. Justice Littledale stated the law very clearly and shortly thus: 'If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done.'" Other authorities have been referred to, notably *Tappenden* v. *Randall*. (2) Upon this ground the common law position of the plaintiff is made good. In terms the money was deposited to abide the event of a marriage taking place, and the deposit had nothing to do with work and labour to be done. The contract itself was simply a wagering contract, and the defendant was to hold the money as stakeholder till the event happened. If the event took place the money was to remain with the defendant, and if it did not take place the plaintiff, unless she is prevented from claiming relief, can recover it back. In answer to the suggestion that something has been done under the contract, the plaintiff may say that it

(1) 8 B. & C. 221; 32 R. R. 369. (2) 2 Bos. & P. 467; 5 R. R. 662.

was no part of the contract that the defendant should make the introductions, and that the steps he took were outside the contract and taken in his own interest to improve his chance of winning the wager, and that being so the event contemplated by the contract had not happened. That seems to me to be a good point; but I do not propose to rest my judgment on that ground only, because there is a wider ground. I refer to the attitude that the Courts of Equity have taken up with regard to the particular mischief arising on marriage brokage contracts. There was no objection at common law, till perhaps some hundred years ago, to such contracts; but the Courts of Equity took a different view, and in consequence the Courts of Common Law modified their view of the matter and shaped their course accordingly. Equity did not take the view that in the case of a contract of this particular kind, tainted with illegality, a case for relief could only be considered where there had been a total failure of consideration. As was pointed out by Lord Hardwicke in *Cole* v. *Gibson* (1), equity reserves to itself the right to intervene even when something has been done in part performance of the contract, or even when the marriage has taken place. That the Courts took a special view of this class of contract appears from many decisions to which reference was made in the course of the argument. For instance, in *Arundel* v. *Trevillian* (2) a bond was set aside, and it appears from the report that the marriage had taken place. In *Smith* v. *Bruning* (3) a bond was ordered to be given up and a gratuity to be repaid. In *Drury* v. *Hooke* (4) a bond was ordered to be given up after the marriage had taken place. The principle upon which the Courts of Equity proceeded is forcibly expressed by Sir Joseph Jekyll M.R. in *Roberts* v. *Roberts* (5), a decision given in the year 1730. "It is most true," said the learned judge, "that equity does abhor all underhand agreements in cases of marriage; and perhaps, this may be the only instance in equity, where a person, though particeps criminis, shall yet be allowed to

(1) 1 Ves. Sen. 503.
(2) 1 Rep. Ch. 3rd ed. p. 47.
(3) 2 Vern. 392.
(4) 1 Vern. 412.
(5) 3 P. Wms. 66.

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avoid his own acts." In *Tappenden* v. *Randall* (1) Heath J. said: "It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would have necessarily applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs, I think there ought to be a locus pœnitentiæ, and that a party should not be compelled against his will to adhere to the contract." In *Reynell* v. *Sprye* (2) Knight Bruce L.J. points out that where the parties to a contract against public policy, or illegal, are not in pari delicto, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him. I cite these cases to shew that the jurisdiction exercised by the Courts of Equity was broader than that of the Common Law Courts, and was not bound by the hard and fast rule that if anything had been done in the furtherance of an illegal contract the Court would not intervene. I come now to more modern cases. In *Taylor* v. *Bowers* (3) Mellish L.J. said: "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." In that case it was clear that some consideration had passed because in pursuance of the agreement the goods of the debtor had been removed and warehoused; but that was not allowed to interfere with the decision of the Court, for, having regard to the main object of the agreement, no part of that had been accomplished. How far is that qualified by the decision in *Kearley* v. *Thomson* (4),

(1) 2 Bos. & P. 467; 5 R. R. 662.
(2) (1852) 1 D. M. & G. 660, at p. 679.
(3) 1 Q. B. D. 291, at p. 300.
(4) 24 Q. B. D. 742.

which was also a decision of the Court of Appeal? Fry L.J. took exception to the statement of Mellish L.J. in the former case; but it is to be observed that in the later case the illegal purpose, which was to defeat creditors, had been largely accomplished, for the contract was that the defendants should not appear at the public examination of the bankrupt, and that contract to abstain from appearing had been carried out. If, therefore, the dicta of the Lord Justice controlled us, they do not apply to the present case, in which, the object being to bring about a marriage, it could not be performed in part. It seems to me that, whether this case is regarded from the point of view of the common law or from the broader point of view of the Courts of Equity, we are entitled to grant the relief asked for, and are not debarred from doing so by reason that the defendant has taken certain steps and incurred some expense towards carrying out his part of the contract. On these grounds I have come to the conclusion that this appeal should be allowed.

MATHEW L.J. I am of the same opinion. There are three questions which we have to consider: first, whether the contract in this case was a marriage brokage contract; second, in what sense is such a contract illegal; and, third, can a marriage brokage contract be rendered binding if there is part performance of it. The first question is, in my opinion, one of fact, a consideration of which the Divisional Court appear to me to have lost sight. If there was reasonable evidence to justify the conclusion arrived at by the learned county court judge, this Court would not interfere with his finding, and I am of opinion that there was evidence on which he could act. The Divisional Court have drawn a distinction between a contract for reward to introduce a number of persons with a view to promoting a marriage with one or other of them and the case of a contract the object of which is to procure the marriage with a particular person. In my opinion no such distinction exists, and I differ from the conclusion arrived at by the Divisional Court. Upon the second question a great number of cases have been cited to us, and in many of them marriage

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Mathew L.J.

brokage contracts are referred to as illegal. I think that we ought to be slow to apply to such contracts the term turpis causa, or to speak of the plaintiff, in such a case as the present one, as allegans turpitudinem. Here, according to the view that I take, there is nothing analogous to a contract in restraint of trade or a contract to stifle a prosecution. The object of the Courts in discountenancing marriage brokage contracts and pronouncing them to be illegal has been to prevent reckless and unsuitable marriages. The real nature of such a contract is that it is nudum pactum, and the law declares that it imports no consideration, and that no rights arise under it. The position, where a contract is nudum pactum and executory, is that while unperformed either party may rescind it. The plaintiff has rescinded the contract, and I do not see why effect should not be given to that rescission. With regard to the sum that the plaintiff seeks to recover, the position of the defendant was that of stakeholder of the whole sum deposited with him. There was an executory contract, no legal consideration, and consequently the plaintiff was entitled to rescind and to recover the money that she had paid. The final question is whether this contract is capable of being set up by the part performance by the defendant of that which he had undertaken to do. The rule of law governing such a case would not exist if there were such an exception to it, because all that would be necessary to establish such a contract as the one in this case would be to bring about introductions to one or two persons, or even to write a letter, or do some other trifling act in order that the defendant might set up a part performance on his part, to entitle him to say that he had earned the money under the contract and made the rule of law inapplicable to the case. It is impossible to suppose that the rule of law could be frustrated in such a manner, and I am of opinion that the appeal against the decision of the Divisional Court should be allowed.

COZENS-HARDY L.J. The only point decided in the Divisional Court was that the contract in this case was not a marriage brokage contract because a contract that can be so described is

a contract for reward to procure for another in marriage a certain specified person. I think the Court was led to that conclusion by reference to the case of *Drury* v. *Hooke* (1), in which the Lord Chancellor defined the transaction as a sort of kidnapping. That was a case to which without doubt the remark would apply, but it was decided in 1686, at a time when there was a difference of opinion between the Courts as to whether the rule as to setting aside a marriage brokage contract was applicable unless there had been fraud, deceit, or coercion, or a total failure of consideration. That point was settled by the decision of the House of Lords in the year 1695 in *Hall* v. *Potter* (2), which set aside a bond given upon a marriage brokage contract, although the contemplated marriage had taken place, and there was no fraud. Since the commencement of the argument in this case I have obtained from the Record Office the bill in the case of *King* v. *Burr*. (3) That case, the facts of which appear to be indistinguishable from those in the case before us, was mentioned to the Divisional Court, but I do not think that the learned judges were aware to what a length the decision goes in its bearing on this case.

We start, therefore, with the fact that the contract was a marriage brokage contract. In cases that came before the Courts in the seventeenth and the beginning of the eighteenth centuries there was a great deal of discussion as to the validity of marriage brokage bonds, and it was held that they were not invalid at law; but the Courts of Equity exercised their original jurisdiction and gave relief against such bonds. As late as 1735 Talbot L.C. in *Law* v. *Law* (4) expressly said that marriage brokage bonds were good at law. That was a case in which a man by his influence with the Commissioners of Excise procured an appointment for another person, who agreed that so long as he held the appointment he would pay to the former a yearly sum. It was ordered that the bond should be given up, and in his judgment the Lord Chancellor said: "But supposing it to be a good bond at law, so are all

(1) 1 Vern. 412.
(2) Show. P. C. 4th ed. p. 98.
(3) 3 Mer. 693.
(4) (1735) 3 P. Wms. 391.

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Cozens-Hardy L.J.

marriage-brokage bonds; which yet are justly condemned in equity as introductive of infinite mischief." Equity, unquestionably, allowed a party to such a transaction to apply for and obtain relief, and ordered bonds that had been entered into to carry out the arrangement to be delivered up and cancelled, and did so even in cases where the transaction was complete and the marriage had taken place, as in *Hall* v. *Potter*. (1) The matter did not stop there, for the Courts of Equity ordered the repayment of money paid in furtherance of such a contract. I have seen the record in the case of *Smith* v. *Bruning* (2), or, as it appears by the record, *Goldsmith* v. *Bruning*, decided in the year 1700 by Trevor M.R., he being the judge who took the view that the House of Lords decided to be the right view in *Hall* v. *Potter*. (1) The Master of the Rolls not only decreed that a marriage brokage bond should be delivered up, but also ordered that a gratuity of fifty guineas that had been paid should be refunded. The Courts, moreover, have declined to permit confirmation of such a contract to be relied on in answer to an application for relief under circumstances in which ordinarily it would have that effect.

I come to the conclusion upon the authorities that there is jurisdiction to order the repayment of the 52*l.* claimed in this action. By not going further into the matter I must not be understood as expressing any doubt as to the other grounds which were given in the judgment of the other members of the Court, but merely as expressing the opinion that the ground that I have indicated is sufficient to decide the case in favour of the appellant.

Appeal allowed.

Solicitors for plaintiff: *Coburn & Co.*

Solicitors for defendant: *Kenneth Brown & Co.*

(1) Show. P. C. 4th ed. p. 98. (2) 2 Vern. 392.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1905
May 3.

SHARP *v.* JOHNSON & CO., LIMITED.

Employer and Workman—Workmen's Compensation—Accident arising out of and in course of Employment—Accident to Workman on Employer's Premises before Commencement of Work—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A number of the workmen employed on certain building work in the country had to come down from London each day by a train which brought them to the place of employment about twenty minutes before the time fixed for commencing work in the morning. The workmen employed on the works were paid by the hour, and each of them had, within three minutes after the time fixed for commencing work for the day, to deposit a ticket at a ticket office at the entrance of the works. It was to the knowledge of the employers the practice of the men coming from London, on their arrival by the train, to come to the works about twenty minutes before the time fixed for commencing work, and, after depositing their tickets at the ticket office, to go for refreshment to a mess cabin provided by the employers on the works for the supply of necessary refreshment to the workmen employed. One of these workmen, who had come from London one morning, while proceeding to deposit his ticket at the ticket office about twenty minutes before the time fixed for commencing work, sustained injuries through accidentally falling into an excavation on the works near the ticket office:—

Held, that the accident arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, s. 1.

APPEAL from the award of the judge of the Greenwich County Court upon a claim for compensation by a workman under the Workmen's Compensation Act, 1897, in respect of injuries occasioned to him by an accident as after mentioned.

The applicant for compensation was a painter, who was employed by the respondents, a firm of builders, upon large buildings which the respondents were erecting for the London County Council at Catford. The applicant was one of a number of the men employed on the works who came from London. The men were paid by the hour, and the hour of beginning work in the morning was 6.30. At that time a whistle was blown, and the men employed each had, within three minutes from then, to deposit a ticket or disc of metal bearing a number, which was supplied to him for that

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purpose, in a slot at a pigeon-hole at a ticket office near the entrance to the works, where a timekeeper then attended for the purpose of receiving such tickets. The slot was not opened, and the timekeeper was not in attendance, for the purpose of receiving tickets until 6.30. There was a mess cabin provided by the employers on the works at which the men could get necessary refreshment. Workmen arriving at the works would have to pass the ticket office in order to get to this mess cabin. It appeared that the only available train, by which the men coming from London each day could reach the works by 6.30, arrived at 5.45 A.M. at the station, from which it was about a quarter of an hour's walk to the works. The applicant had been employed for about five weeks on the works, and it was found by the county court judge that during that period it had been his practice, and that of other workmen coming from London to the works, on entering the works at about 6.5 A.M., to put their tickets, in passing the ticket office, on the ledge of the pigeon-hole to be taken by the timekeeper when he arrived, and proceed to the mess cabin for refreshment, and that the foreman painter employed on the works, who often came by the same train, knew of this practice. On the day when the accident occurred the applicant, who arrived at the works about 6.5 A.M., went through the gate of the works as usual, and proceeded towards the ticket office in order to deposit his ticket on the ledge of the pigeon-hole before going to the mess cabin. On the way which he took to the ticket office there was an excavation, which had been recently made in the ground for the purpose of receiving certain stop-cocks. While he was in the act of endeavouring to get across this excavation, a night watchman employed on the premises, observing him stumbling about, offered to take his ticket and put it on the ledge for him; and, while he was handing the ticket to the watchman for that purpose, some planking placed over the excavation on which one of his feet was resting slipped, and he, in consequence, fell into the excavation and sustained the injuries in respect of which he claimed compensation.

The county court judge held that the accident did not arise

out of or in the course of the applicant's employment, and therefore refused to award him compensation.

Ruegg, K.C., and *Chester Jones*, for the applicant. The county court judge seems really to have acted on the view that the employment only begins for the purposes of the Workmen's Compensation Act, 1897, when the workman begins the actual work for which he is employed. The authorities clearly shew that such a view is incorrect. It has been held in many cases that the term "employment" would include a reasonable period of time taken by the workman in passing upon the employer's premises to the spot where he has to work, or in getting off the premises when his work is done. In *Blovelt* v. *Sawyer* (1) it was held that, where a workman was paid by the hour while actually engaged at work, and was allowed during the dinner hour to eat his dinner on the employer's premises, his employment did not cease during the dinner hour. Here the applicant had come on to the employers' premises for the purposes of his work. The men coming from London could only come by a train which brought them to the works a short time before the work actually commenced, and the mess cabin was provided by the employers, apparently, to supply refreshment for men under such circumstances. When the applicant met with the accident he was engaged in depositing his ticket at the ticket office, which it was his duty to his employers to do. The judge has found that the practice was that men coming by the early train from London were allowed to come on to the works before 6.30, and deposit their tickets on the ledge of the pigeon-hole and thence proceed to the mess cabin to procure refreshment. It was for the advantage of the employers as well as for their own convenience that they should be allowed these facilities for the prosecution of the work. In the case of *Cross, Tetley & Co.* v. *Catterall* (2) it was held in the House of Lords that, where a miner met with an accident while passing over a bridge erected by his employers for the convenience of their workmen on his way to a lamp cabin to get his lamp, before commencing work, that accident might be said to have arisen

(1) [1904] 1 K. B. 271. (2) March 16, 1905. Not reported.

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out of and in the course of his employment. Lord Halsbury L.C. there said that he could not agree that the employment did not begin till the miner struck coal with his pick, and that the man was doing something on behalf of his employers, and that was essential to the work which he had to do, when on his way to the cabin to get his lamp.

Walter Stewart, for the respondents. The case of *Cross, Tetley & Co.* v. *Catterall* (1) is no authority for the present case. There the question seems to have been as to the place where, and not the time when, the employment began. It may be admitted that, when the workman has in the ordinary course of the employment arrived on the employer's premises, he will be entitled to the protection of the Act while passing on those premises to the spot at which he has to work. But that proposition has no application to the present case. The question here is as to the time at which the employment can be said to begin. It may be, no doubt, to some extent a matter of degree. Here the workman was for his own convenience upon the premises of the employers twenty minutes before the time at which it was his duty to be there; and the judge must be taken to have found as a fact that this was a period so long before the time fixed for actually commencing work that it could not reasonably be considered as included in the period of employment. If there was any evidence to support that finding, as it is submitted there was, this Court is bound by his finding of fact. In *Blovelt* v. *Sawyer* (2) the actual working hours of the day had commenced, which was not the case here, and it was held merely that there was no break of the employment under the circumstances during the dinner hour. There it was considered to be for the advantage of the employers that the workmen, having commenced work, should remain on the works instead of going away for dinner, but there is nothing to shew that it was for the advantage of the employers in this case that the workmen should come upon the works before 6.30, the time fixed for the commencement of work in the morning. There was really no evidence to shew that the employers had sanctioned the practice of

(1) Not reported. (2) [1904] 1 K. B. 271.

doing so. [He cited *Benson* v. *Lancashire and Yorkshire Ry. Co.* (1)]

Ruegg, K.C., was not called upon to reply.

COLLINS M.R. This is an appeal by a workman against whose claim for compensation under the Workmen's Compensation Act, 1897, the county court judge has decided. The circumstances of the case are briefly these. The applicant was employed as a workman upon a big building contract, which was being carried out by the respondents at Catford. He had to come from London to the place where the work was being done, and the only available train by which he could arrive before 6.30 A.M., at which time it was his duty to commence work, was one by which in the ordinary course of things he would arrive at the works about twenty minutes before the time for commencing work. It appears that the practice was that each of the workmen employed on the works was provided with a ticket, which he had to put into a slot at a ticket office before he began working, and which evidenced the fact that he had arrived upon the works. There was upon the works a place provided by the employers where the workmen employed could get necessary refreshment, and, on arriving at the works, in order to get to that place, the workman would have to pass the ticket office. The applicant, having on the morning in question arrived by the only practicable train from London in the usual course, found himself at the works about twenty minutes before the time at which work commenced. He had been engaged on the works about five weeks, and the learned county court judge finds that it was known to the foreman painter that it was the practice of the men arriving by that train before work began to place their tickets on the ledge of the pigeon-hole, in order that the timekeeper might find them there when he arrived, and proceed to the mess cabin for refreshment. It appears to me that this practice obviously must have been known to those who were in control of the works as representing the respondents, because the applicant was one of a considerable body of men employed on the works

(1) [1904] 1 K. B. 242.

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who came every morning from London by the same train, and whose practice it was to act in the same way—namely, to leave their tickets on the ledge of the pigeon-hole and, if they required refreshment, to go on thence to the mess cabin to procure it, before the time fixed for the commencement of work. On the morning in question, as soon as the applicant got to the works, he proceeded towards the ticket office for the purpose of leaving his ticket there in the usual manner on his way to the mess cabin. While he was endeavouring to get across an excavation which had been made in the ground on his way to the ticket office, a night watchman, who was employed on the premises, observing him stumbling about, offered to take his ticket and put it for him in the proper place. Just at the moment when he was handing his ticket to the watchman a plank on which he was standing slipped, with the result that he fell into the excavation and sustained injuries. The spot at which the accident happened was not perhaps on the most direct way from the entrance of the works to the ticket office. A point was made of this for the respondents at the trial, but the county court judge decided against it, and the counsel for the respondents makes no point of that fact on this appeal. Therefore the sole point now before us is whether, by reason of the fact that the time when the accident happened to the applicant was some twenty minutes before the time for the commencement of work arrived, the accident cannot be said to have arisen out of and in the course of the applicant's employment. The county court judge has found that the accident did not so arise. Where a county court judge has come to a conclusion of fact which there is evidence to support, this Court is bound by his finding. I have felt some difficulty as to whether we are not in this case bound by the learned county court judge's finding. If he had found that the accident did arise out of and in the course of the applicant's employment, I should have seen no reason for differing from that conclusion. In that case I should have said that it was a question of fact, and, as he had so found, we were bound by his finding. The learned judge having found the other way, the question is whether we are bound by that finding. I think

that, when one comes to consider what he said in giving judgment, his conclusion really appears to have been based on a misdirection of himself in point of law; and that, when once that misdirection is eliminated, there is in truth no controversy of fact, and it is clear that the accident did arise out of and in the course of the applicant's employment. I think that the proposition of law upon which the finding of the county court judge really proceeded was that, for the purposes of the Act, the employment of the workman cannot be said to have commenced until the moment when he actually began the work of painting. It seems to me that this clearly involves a misdirection, for I think that the authorities clearly shew that a reasonable margin must be allowed to the workman for the purpose of getting to the part of the premises where his actual work is to be carried on; and, if during that interval he is engaged in doing something which is for the benefit of his employer as well as of himself, e.g., in getting necessary refreshment upon the premises, he is just as much engaged in his employment as if he were engaged in the actual work which he has to do. It clearly appears to have been decided, both in this Court and the House of Lords in *Cross, Tetley & Co.* v. *Catterall* (1), that the moment at which the actual work of the workman begins cannot be taken as the true moment of the commencement of his employment for the purposes of the Act. Lord Halsbury L.C. appears to have said in that case that it was not correct to say that the employment of a miner did not begin till he struck coal with his pick, and that the workman there was doing something on behalf of his employers, as being essential to the work which he was employed to do, when going to the lamp cabin to get his lamp. It was there held that the employment commenced as soon as the workman crossed the boundary line of the employers' premises, though he had to do something after getting over that boundary before he could commence his actual work. So the moment of beginning the actual work is not the true test of the time when the employment commences. The county court judge having, as it seems to me, gone wrong by applying that

(1) Not reported.

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standard, when that misdirection is eliminated, the facts appear to me to be all one way. In this case the workman was obliged by exceptional circumstances, for the convenience of the master as well as himself, to enter upon the employment at an earlier period than under ordinary circumstances he would have done. Having to come from London by a certain train, the applicant and other men were under a practical necessity of arriving at the place of employment before the time fixed for the commencement of their actual work, and, in view of that necessity, the employers appear to have provided a place where they could get the necessary refreshment before commencing work. It appears to me that, having regard to the authorities, the applicant was, upon the undisputed facts, engaged in his employment when the accident happened. Therefore, notwithstanding the difficulty which I have felt, I think that we may differ from the learned county court judge, because we are not really differing from him on a question of fact of which there was evidence for him, but merely correcting an erroneous decision by him on a question of law. For these reasons I think the appeal must be allowed.

MATHEW L.J. I am of the same opinion. It seems to me clear that the learned county court judge decided this case on the ground that the employment only commences when the workman actually begins to work. That appears upon the authorities to be a clear misdirection. It was urged by the counsel for the respondents that the county court judge must be taken to have found as a matter of fact that the applicant arrived at the place of employment at an unreasonably long period before the time for commencing work. If the judge had so found, possibly it might have raised a difficulty; but I do not think that is the case, and I should not suppose it at all likely that he would arrive at such a finding on the facts. The applicant was one of a group of men who, in order to reach the works by the time fixed for the commencement of work, had to come by an early train. It was for the advantage of their employers as well as themselves that they should do so. The employers shewed that they appreciated the situation by providing for the men an opportunity of obtaining

necessary refreshment upon the ground before commencing work. How could it be said under the circumstances that there was anything unreasonable in the applicant's arriving at the place of employment when he did? I think that the county court judge's decision did not involve any such finding of fact as suggested by the respondents' counsel, but that he thought that the applicant was not entitled to the protection of the Act until he actually commenced working.

COZENS-HARDY L.J. I agree. This is not the case of a man hanging about his employers' premises during an unnecessarily long period before work commences. The applicant, with other workmen, had to come down from London by an early train, which brought them to the place of employment about twenty minutes before the time for actually beginning work. The employers seem to have been aware of this, and they had provided a mess cabin on the works at which the men employed could obtain refreshment, and which appears to have been open between 6.5 and 6.30 A.M. There was abundant evidence that, although, strictly speaking, it was the duty of the workmen to put their tickets in the slot at the ticket office within three minutes from 6.30 A.M., it was the common practice of the men, when they arrived by the early train from London, to put their tickets on the ledge in front of the pigeon-hole, in order that the timekeeper might take them thence, as he habitually did, on his arrival at the ticket office at 6.30. There is no doubt that only a reasonable margin before the time of commencing actual work can be considered as coming within the period of employment, but it must, I think, cover an interval during which, as in this case, with the knowledge and consent of the employers, the workman was permitted to be upon the premises for the purpose of depositing his ticket and then proceeding to the mess cabin provided by them in order to procure refreshment.

Appeal allowed.

Solicitors for applicant: *Shaen, Roscoe, Massey & Co.*
Solicitors for respondents: *Ponsford & Devenish.*

E. L.

C. A.
1905
May 5.

[IN THE COURT OF APPEAL.]

BACK *v.* DICK, KERR & CO., LIMITED.

Employer and Workman—Workmen's Compensation—Employment on or in or about Engineering Work—Work ancillary to Engineering Work—Place used for Storage of Materials—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman in the service of contractors, who had contracted to take up the rails of certain existing horse tramways in a town, and lay down rails for new tramways to be worked by electric power, while employed in unloading and stacking rails intended for the new tramways in a yard belonging to a railway company, sustained injuries through an accident which arose out of and in the course of that employment. The rails had been brought by the railway, and, by arrangement between the railway company and the contractors, the latter were permitted to use a portion of the railway company's yard for the storage of the rails till they were required for the purposes of the new tramways. At the time of the accident the only work then commenced under the contract was the taking up of the rails of the old tramway in a street at a distance of about 700 yards from the railway company's yard:—

Held, that the workman was not at the time of the accident employed on or in or about an engineering work within the meaning of the Workmen's Compensation Act, 1897, s. 7.

APPEAL against the award of the judge of the Exeter County Court, awarding compensation to a workman under the Workmen's Compensation Act, 1897.

The applicant for compensation was at the time of the aftermentioned accident in the employ of the respondents, who were contractors. The respondents had entered into a contract with the corporation of Exeter to take up the rails of certain existing horse tramways, which ran through several streets in Exeter, and to lay down rails for new tramways to be worked by electric power. Among the tramlines included in the contract was one which ran along the street leading from St. David's Station, in Exeter, to the Clock Tower, and thence along a street called Queen Street. The new rails to be laid down under the contract were brought by the London and South Western Railway to a yard at their Queen Street Station

in Exeter, which abutted on and had a gateway opening into Queen Street. By arrangement between the company and the respondents the latter were permitted to stack and store portions of the rails so brought in a part of the yard appropriated for that purpose until they were wanted for the purposes of the tramways, when they were taken direct from the yard to the place where they had to be laid. While the applicant was employed in assisting to unload some of these rails from a truck, and stack them in the railway company's yard, one of his arms was injured by an accident arising out of that employment. At the time of the accident the only work then commenced under the contract was the taking up of the rails of the old tramway in the street on the St. David's Station side of the Clock Tower, about 700 yards away from the yard where the accident happened. It was contended at the hearing before the county court judge for the applicant that, at the time when he met with the accident, he was employed on or in or about an "engineering work." It was not disputed for the respondents that a "tramway" was a "railroad," and therefore the construction or alteration of it came within the definition of "engineering work" given by the Workmen's Compensation Act, 1897, s. 7, sub-s. 2; but it was contended that according to the authorities the expression "engineering work" as used in the section imported the locality where such work was being executed, and that the railway yard where the rails were stored could not be considered as included in that locality; and therefore the applicant was not, when he met with the accident, employed on or in or about "an engineering work" within the meaning of the section.

The county court judge in giving judgment said that he had come to the conclusion that it would be impossible to limit the meaning of "engineering work" to the extent contended for by the respondents; and that, although the word "work" imported locality as meaning the thing upon which the labour was bestowed, he thought the words "on or in or about an engineering work" must include "any portion of the selected area upon which the essential operations were conducted." He therefore found that the site upon which the rails were stacked

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BACK v. DICK, KERR & CO., LIMITED.

in the yard was "on or in or about an engineering work," and awarded compensation to the applicant.

The respondents appealed.

W. Shakespeare, for the respondents. It is quite clear on the authorities that the term "about" as used in the Workmen's Compensation Act, 1897, s. 7, sub-s. 1, imports physical contiguity: see *Fenn* v. *Miller* (1); and that the expression "engineering work" as used in s. 7 imports a definite locality where the work is being executed: see *Chambers* v. *Whitehaven Harbour Commissioners*. (2) It cannot be said that the railway yard, which was 700 yards away from the place where the engineering work was being carried on, was part of the site of that work. [He also cited *Pattison* v. *White & Co.* (3)]

H. C. Gutteridge, for the applicant. The county court judge has found that, the part of the railway yard appropriated to the storage of the rails intended to be used for the engineering work being part of the selected area upon which the operations essential to that work were being carried on, it was really part of the locality of the engineering work considered as a physical entity; and there was, it is submitted, evidence on which he was entitled so to find. In the case of a "factory," such as that of *Fenn* v. *Miller* (1), somewhat different considerations apply, because the boundaries of such a building are more capable of exact definition. An engineering work such as the construction of a railway or tramway must necessarily be less exactly definable as regards its boundaries. The part of the railway yard where the rails were stacked was occupied by the respondents as a convenient place for storing them so as to be accessible for the purposes of the work, and the work of storing them there was a necessary operation incidental to the engineering work. The place where it was being carried on was therefore part of the area where the essential operations of the engineering work were being carried on by the employers. [He also cited *Coles* v. *Anderson* (4); *Atkinson* v. *Lumb* (5);

(1) [1900] 1 Q. B. 788.
(2) [1899] 2 Q. B. 132.
(3) (1904) 20 Times L. R. 775.
(4) (1905) 21 Times L. R. 204.
(5) [1903] 1 K. B. 861.

Ferguson v. *Barclay, Sons & Co.* (1); *Anderson* v. *Lochgelly Iron and Coal Co.* (2)]

Shakespeare, for the respondents, was not called on to reply.

COLLINS M.R. This is an appeal from the award of a county court judge, awarding compensation to a workman under the Workmen's Compensation Act, 1897. The applicant was a workman employed by the undertakers of what was no doubt an engineering work, namely, the construction of an electric tramway in the place of an old horse tramway. At the time of the accident the only place at which the work under the contract had been commenced was about 700 yards from the place where the accident to the applicant happened, on the St. David's Station side of the Clock Tower. The place where the accident happened was a yard belonging to the London and South Western Railway Company where, by arrangement between the contractors for the construction of the new tramway and the railway company, rails intended to be used for the new tramway were stacked. The applicant was employed at this yard in unloading from a truck and stacking some of these rails, which were destined for use by the undertakers at the place where they were constructing the tramway. The question raised before the county court judge was whether the applicant was, at the time when the accident happened, employed on or in or about an "engineering work." In order to deal with that question it is necessary to consider what is the meaning of the term "engineering work" as defined by decisions on the subject given by this Court, which have been referred to during the argument, and to which I need not refer in detail. The result of them appears to me clearly to be that "engineering work" does not in the Workmen's Compensation Act, 1897, mean the labour bestowed on such a work, but the locality where such labour is being bestowed. It indicates a physical area on or in or about which the workman must be employed in order that the case may come within the Act. The physical area where the construction of the new tramway was, at the time of the accident, being carried on was 700 yards away from the scene of the accident; and it seems to me that, unless it

(1) (1902) 5 F. 105. (2) (1904) 42 Sc. L. R. 147.

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can be said that the yard belonging to the railway company was part of the physical area of the engineering work, the case cannot be brought within the Act. I do not think that can be said. The workman was, no doubt, employed on work which was incidental to the engineering work on which the undertakers were engaged, but, as I have said, I do not think that he can be deemed to have been employed on or in or about an "engineering work," in the sense in which that expression is used by the Act, unless the yard where the accident happened can be said to have been part of the physical area of that engineering work. The learned county court judge has drawn the inference that the yard was part of that physical area, because he said that, although the word "work" imported a definite locality as meaning the thing upon which the labour was bestowed, he thought that the words "on or in or about an engineering work" must include "any portion of the selected area upon which the essential operations were conducted." I cannot agree with the test so applied by the county court judge. I do not think that any piece of land, upon which any work incidental, though perhaps essential, to an engineering work is being carried on, is thereby necessarily constituted part of the site of the engineering work. It seems to me that the learned county court judge has arrived at the conclusion to which he came through a misdirection of himself in point of law; and that, the railway yard at which the accident happened being 700 yards away from the engineering work that was being carried on, the accident could not be said to have happened on or in or about an engineering work within the meaning of the Act. For these reasons I think that the appeal must be allowed.

MATHEW L.J. I am of the same opinion. The county court judge arrived at his conclusion by finding that the spot at which the accident happened was part of the area of the engineering work upon which the undertakers were engaged. I cannot agree with that view. It was no part of the contract into which they had entered that the rails should be stacked there. They were no doubt placed there in order to enable the undertakers to carry out the work which they had contracted to do, but the unloading and stacking of the rails at

that place formed no part of that work. I do not think that the accident can be said to have occurred on or in or about an engineering work within the meaning of the Act.

COZENS-HARDY L.J. I am of the same opinion. I think we should, if we were to affirm the decision of the county court judge, be extending the operation of the Act beyond the reasonable meaning of its language. The short facts here are that the injured man was engaged in assisting to unload from a truck in a yard belonging to the London and South Western Railway Company, and then stack, certain rails which had been brought down by the railway consigned to the contractors for the work of constructing a tramway, and which no doubt were intended to be used for the purposes of that work. He was simply employed in unloading and storing materials to be afterwards used for the purpose of the contract work. It seems to me impossible to suppose that the railway yard was thereby constituted a part of the area of the engineering work, which was in fact being carried on 700 yards off. If that were so, then it would follow that, if materials for an engineering work were stored in any place, as for instance if sleepers for the new tramway had been brought by the Great Western Railway and stored at their station, or had been brought by water and stored in a timber merchant's yard, the place where they were stored would become part of the area of the engineering work, so that, if an accident happened there, it might be said to have happened on or in or about an engineering work within the meaning of the Act. I do not think the learned county court judge sufficiently bore in mind the interpretation given to the term "engineering work" by this Court in previous cases.

Appeal allowed.

Solicitors for applicant: *Baylis, Pearce & Co., for Dunn & Baker, Exeter.*

Solicitors for respondents: *William Hurd & Sons, for Ford, Harris & Ford, Exeter.*

E. L.

C. A.
1905
May 5.

[IN THE COURT OF APPEAL.]

CHALLIS *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Employer and Workman—Workmen's Compensation—Accident arising out of the Employment—Engine-driver—Stone wilfully thrown at Train—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), s. 1.

Where an engine-driver, while driving a train under a bridge, was injured through a stone wilfully dropped on the train by a boy from the bridge:—

Held, that his injuries were caused by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, s. 1.

APPEAL from the award of the judge of the Basingstoke County Court upon a claim for compensation made by the dependants of a deceased workman under the Workmen's Compensation Act, 1897.

The deceased workman was an engine-driver in the employ of the respondents, the London and South Western Railway Company. As an express train, which he was driving from Basingstoke to Waterloo, was passing under a bridge, called Merton Road Bridge, at the rate of fifty miles an hour, a stone, which, as the county court judge found, was wilfully dropped on the train from the bridge by a boy, struck and broke the "eye-glass" of the driver's cab on the engine, the result being that the driver's face was cut, and fragments of broken glass were driven into his eyes. Some months afterwards he died, and there was conflicting evidence on the question whether his death was the result of the accident, or resulted from disease arising independently thereof. The county court judge did not decide that question, as he held in effect that, the injury to the deceased man being the result of a wilful and intentional act on the part of the boy who dropped the stone, it could not be said to have been an accident coming within the Act. He therefore refused to award compensation to the applicants.

Ruegg, K.C., and *Compston*, for the applicants. The county court judge was wrong in holding, as he did, that what happened could not be an accident within the Act because it was the result of a wilful and intentional act done by the boy. It is a well-known risk to which engine-drivers are exposed that mischievous boys will throw stones at trains in motion. So common is the practice of throwing things at trains that provisions have been made by the Legislature constituting it under certain circumstances an indictable offence: see 24 & 25 Vict. c. 100, s. 33. The test is whether the risk of such an accident as has happened is one which is incidental to the employment. In the case of *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) the accident was held not to have arisen out of the employment, because it was not one of a kind ordinarily incidental to the employment. That cannot be said of the accident in this case.

C. A. Russell, K.C., and *J. A. Simon*, for the respondents. The cause of the injury to the deceased man having been the wilful and intentional tort of a stranger not in the employ of the railway company, it cannot be said to have been caused by an accident arising out of the employment. The case comes exactly within the principle of the decision in *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) The decision in *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Co.* (2) is also to the same effect. The fact that a mischievous boy throws a stone at a train from outside the company's premises cannot be said to be an accident arising out of the engine-driver's employment. It is a matter over which the company have no control, and which cannot be said to be incidental to their business. In some of the decisions such expressions as "risk incidental to the employment" have no doubt been used, but that expression is only a gloss on the words of the Act, which are "accident arising out of the employment"; and care should be taken to see that it is not so used as to extend the meaning of the language actually used. The Legislature cannot be supposed to have anticipated that accidents would be caused to workmen in the course of

(1) [1902] 2 K. B. 178. (2) (1901) 3 F. 564.

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their employment by the criminal or tortious acts of persons not in the service of their employers. If the wilful act of throwing a stone at a train only occurred in an isolated case, no one would say that it was an accident arising out of the employment. It cannot make any difference in principle that it is a tempting offence for mischievous boys to commit, and therefore of more frequent occurrence.

Ruegg, K.C., for the applicants, was not called on to reply.

COLLINS M.R. This is an appeal from the award of a county court judge dismissing a claim for compensation made by the dependants of a deceased engine-driver. The circumstances were these. While the deceased was driving a train under a bridge, what is called the "eye-glass" of the driver's cab on the engine appears to have been broken by a stone, which the county court judge finds to have been deliberately thrown by a boy standing on the bridge. The effect of the breaking of the glass was that the driver's face and eyes were injured. It has not been finally decided whether that injury was ultimately the cause of his death, because the county court judge held that the injury was not caused by an accident arising out of the deceased's employment, and therefore it was not necessary to determine that question. The decision of the county court judge being, as it appears to me, limited to the legal proposition that, under the circumstances above mentioned, there was not, in point of law, an accident within the Act, I think this Court is at liberty, if they think that the judge was wrong in law in so holding, to consider whether the particular occurrence which in fact happened in this case was an accident which arose out of and in the course of the employment of the deceased man. That was not, apparently, the point to which the county court judge really addressed his mind. He appears to me to have decided that, as the stone was wilfully dropped, it was an intentional act, and, therefore, there could not be said to have been an accident. I think that the judge was wrong in so holding. I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened from being an accident from the standpoint of the

person who suffered through it. The question remains whether it was an accident which arose out of and in the course of the deceased's employment. That is the only question which was argued before us. It was not contended that there was not an accident. The contention was that this occurrence, though an accident, was not one which could be said to have arisen out of the deceased's employment. I do not think that, in deciding that question, we should be justified in leaving out of sight what is matter of common knowledge and experience in relation to the subject with which we are dealing; and therefore we must, I think, approach the question whether what occurred was a risk incidental to the employment of an engine-driver from the standpoint that a train in motion has great attractions for mischievous boys as an object at which to discharge missiles. It seems to me that the Legislature, in framing the Workmen's Compensation Act, 1897, intended to provide for the risks of accident which are within the ordinary scope of the particular employment in which the workman is engaged. No doubt the Act does not use the expression "risks incidental to the employment"; but the interpretation of the words "accident arising out of and in the course of the employment" appears to me necessarily to involve the consideration of the question what risks are commonly incidental to the particular employment in question. The cases relied upon by the respondents are not in my opinion inconsistent with the view that such an accident as occurred in the present case is within the Act. On the contrary, they appear to me to be rather in favour of that view. Take the case of *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) It appears from the judgments in that case that, in dealing with the question whether the particular accident which had happened arose out of the employment, the test applied was whether it was within the scope of the employment of the workman to submit to the risk of such an accident; and in that case we held that, the accident not being one to the risk of which it was within the scope of his employment to submit, it did not come within the purview of the Workmen's Compensation Act, 1897. In

(1) [1902] 2 K. B. 178.

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the case of *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Co.* (1) the same test seems to have been applied by all the judges of the Court of Session in Scotland. In giving judgment, the Lord Justice-Clerk said: "It was as against accidents incidental to the special employment that the benefit of this statute was given." Lord Trayner said: "If some servants leave their work and indulge in horseplay to the injury of a fellow servant, that does not infer liability on the employer. It cannot be said to be incidental to his business, or one of the hazards attached to it." In the present case such an accident as happened does appear to me to be one incidental to the employment and a hazard attached to it. Lord Moncrieff held that the particular accident in that case was one incidental to the employment, and therefore differed from the conclusion arrived at by the majority; but all the members of the Court appear to have concurred in the view that the object of the Workmen's Compensation Act, 1897, was to provide for those risks which are incidental to the particular employment in which the workman is engaged. For these reasons I think that, as a matter of law, upon the facts in this case there was an accident arising out of the deceased workman's employment; but, as the county court judge has left undetermined the question whether the death of the workman resulted from that accident, the case must go back to him in order that he may decide that question.

MATHEW L.J. I agree. In common parlance the accident which happened in this case would be said to have arisen out of the workman's employment; and I cannot see why the Act should not be construed according to the fair meaning of the words employed in their ordinary sense. The accident which befell the deceased was, as it appears to me, one which was incidental to his employment as an engine-driver; in other words, it arose out of his employment. The argument for the respondents really involves the reading into the Act of a proviso to the effect that an accident shall not be deemed to be within the Act, if it arose from the mischievous act of a person not in the service of the employer. I see no reason to suppose

(1) 3 F. 564.

that the Legislature intended so to limit the operation of the Act. The result is the same to the engine-driver, from whatever cause the accident happened; and it does not appear to me to be any answer to the claim for indemnification under the Act to say that the accident was caused by some person who acted mischievously.

COZENS-HARDY L.J. I am of the same opinion. It was argued for the respondents that the commission of a criminal offence by a stranger could not be anticipated as a risk incidental to a workman's employment, in respect of which the employer would be responsible under the Act. To a certain extent I agree with that contention. I should hesitate to say that an accident due to stone-throwing by a stranger would in the case of every employment come within the Act. I am not, however, prepared in this case, and I think it would be absurd, to disregard what is common knowledge, namely, that the offence of throwing stones at trains from bridges and other places by boys is of frequent occurrence. It seems to me that the risk of such an occurrence is one which may reasonably be looked upon as incidental to the employment of an engine-driver, though it might not be incidental to other employments. In my opinion the county court judge was wrong in thinking that what happened in this case could not be an accident within the Act, because it was the result of a tortious act wilfully committed by some person in throwing the stone from the bridge. When the case of *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (1) is carefully considered, it appears to me to be rather in favour of the view which we are taking than against it. I may observe that the illustrations which I gave of accidents coming within the Act in my judgment in that case were not intended to be exhaustive.

Appeal allowed.

Solicitors for applicants: *Oscar Edmonds, for Ford & Warren, Leeds.*

Solicitor for respondents: *Samuel Bircham.*

(1) [1902] 2 K. B. 178.

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1905

Jan. 20, 23.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL ON THE RELATION OF THE MONMOUTHSHIRE COUNTY COUNCIL AND THE SAME COUNCIL *v.* SCOTT.

Highway—Extraordinary Traffic—Locomotive—Traction Engine—Nuisance—Injury to Road—Default of Local Authority in Maintenance of Road—Locomotive Act, 1861 (24 & 25 *Vict. c.* 70), *s.* 13; *Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 6.

In an action by the Attorney-General, on the relation of a county council, to restrain the defendant from using a traction engine upon a road in such a way as to cause a public nuisance, it was at the trial found by Jelf J. as a fact that the condition of the road was not caused primarily by the defendant's traction traffic, but partly by the traction traffic, partly by stone haulage by carts and horses, partly by the ordinary traffic, and partly by the weather, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic, (including the traction traffic) which was not more unusual or onerous than they ought to have expected to come upon it:—

Held, by the Court of Appeal (affirming the judgment of Jelf J.), that upon the facts so found the plaintiffs were not entitled to a perpetual injunction to restrain the defendant from bringing his traction traffic upon the road, and that an interlocutory injunction which had been granted upon affidavit evidence must be dissolved.

THE writ in the action claimed an injunction to restrain the defendant, his servants or agents, from using or causing or procuring to be used any locomotive, or otherwise conducting any traffic upon a certain highway in the county of Monmouth in such a way as, by damage to or obstruction of the highway, to cause a public nuisance. In his defence the defendant denied that the traffic conducted by him over the highway was excessive or unreasonable, or that his user of the highway for the purposes of his traffic caused a nuisance; he also, by way of counter-claim, claimed a declaration that it was the duty of the county council to maintain the highway of a construction and strength sufficient to bear the passage over it of his locomotive, and also an order directing the county council to repair the highway so far as was necessary for that purpose.

An interlocutory injunction substantially in the terms of the writ was granted by Phillimore J., and his decision was in January, 1904, affirmed by the Court of Appeal. (1)

At the trial of the action, which lasted several days in June, 1904, it appeared that the defendant was the owner of a quarry in the parish of Llanvihangel Roggiett, and that he was the holder of a licence granted by the county council of Monmouthshire under the Locomotives Act, 1898 (61 & 62 Vict. c. 29), for the use of a locomotive within the county. He used an engine and carts for hauling stone from his quarry to a station on the Great Western Railway, and the complaint of the county council was that the defendant's traffic over the road in question was extraordinary and unreasonable, and that its weight was excessive and improper, and that the road was so damaged that it was rendered impassable for ordinary traffic and dangerous to wayfarers. Many witnesses were called for the plaintiffs at the trial, including the surveyor to the county council, who gave evidence as to the dangerous state of the road since the defendant had used his traction engine to haul loads of stone over it; put shortly, the evidence was to the effect that the defendant used a traction engine of the weight of about eleven tons and two laden trucks; that the road was an old turnpike road, and the traffic brought upon it by the defendant was more than an ordinary metalled road could bear; that the road could not be properly kept in repair while such traffic was being conducted over it, and that the highway had become, in consequence of the excessive traffic carried on by the defendant, a nuisance and a source of danger to the public. The defendant contended that at the date of the interim injunction the road was not a properly constructed road having regard to the fact that the ordinary traffic over it was the hauling of stone, and that as the county council had commenced to repair the road and to put it into a proper condition for bearing the ordinary traffic of the district, it would be improper to grant a perpetual injunction against the defendant when the road had been put in a perfectly different condition. Many witnesses were called by the defendant, who

(1) [1904] 1 K. B. 404.

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gave evidence as to the character of the road, and agreed that its condition arose from the bad way in which it had been made, and from the fact that it was insufficiently kept and repaired by the county council. The defendant said that the road had always been a bad one, and that prior to 1902 he had hauled the stone in carts, which made deep ruts in the road, but that the effect of using the traction engine had been that, owing to the breadth of its wheels, the ruts were worn down and the road improved; that improper materials had been used by the county council for its repair, but that the road had never been dangerous to traffic. At times the amount of stone hauled over the road had amounted to 130 or 150 tons a day; but it was contended that that quantity did not constitute excessive traffic.

A. T. Lawrence, K.C., Macmorran, K.C., and *J. R. Atkin*, for the plaintiffs.

Arthur Powell, K.C., R. Cunningham Glen, and *A. A. Bethune*, for the defendant.

Cur. adv. vult.

1904. July 2. The following judgment was delivered by

JELF J. After stating the claim as it appeared on the pleadings, the learned judge proceeded:—In accordance with the requirement of the Attorney-General usual in such cases, the Monmouthshire County Council are added as co-plaintiffs solely in order to make them responsible parties in the action. The writ was issued on December 7, 1903. By an order of Phillimore J. dated December 19, 1903, an interim injunction was granted substantially in the terms of the claim. This order was affirmed by the Court of Appeal on January 12, 1904, and the decision is reported, [1904] 1 K. B. 404. How far, if at all, my judgment and discretion are fettered by the judgments of the Master of the Rolls and Mathew and Cozens-Hardy L.JJ. in that interlocutory proceeding, I will discuss later on.

The locus in quo is a section (898 yards in length) of a main road repairable by the county council and leading from Caldicott to Magor. The defendant was a hauler, and the complaint of

the county council was that he hauled stone with a traction engine and trucks over the main road from a neighbouring quarry belonging to a Mrs. Hillier by contract with her, and also from a neighbouring quarry of his own, in such a way as to cut up that section of the main road, and render it dangerous and practically impassable both for vehicles and pedestrians. His hauling from those quarries was, as to his own quarry, by a public road belonging to the Chepstow District Council, and as to Mrs. Hillier's quarry by a private road, in each case on to the same section of the main road, and thence by another district council road to the Severn Tunnel Junction railway station for the purpose of carriage by railway to certain blast furnaces where there was a great demand for the stone in question. This traffic by the defendant's traction engine began on May 2, and went on till it was stopped by the interim injunction of December 19, 1903. An attempt was made by the defendant after the injunction was granted to use the traction engine with less weights without infringing the injunction, but this was immediately followed by threatened proceedings for attachment, and since January 18, 1904, the use of the traction engine over the locus in quo has been entirely abandoned. The traction engine and trucks used by the defendant and the weights carried thereby were in all respects strictly in conformity with the regulations of the Locomotives Acts. There was no evidence that the engine and trucks were improperly constructed, or driven or handled, or that the traffic was conducted wantonly or recklessly, or otherwise than in the honest and bonâ fide exercise of the defendant's legitimate business. Nor was it the county council's case that this traffic constituted a public nuisance in regard to smoke or noise, or likelihood to frighten horses, or in any other way except cutting up and injuring the roadway. Nor was it contended that any single passage of the engine and loaded trucks over the road was unlawful or a nuisance; but it was alleged that the frequency of the journeys with heavy loads constituted or created a public nuisance. Quarrying of stone had been for many years a recognised industry of the district, and for several years the defendant had hauled

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stone with carts and horses from Mrs. Hillier's and from another neighbouring quarry belonging to a Mr. Perry over the section of the road in question to the Severn Tunnel Junction railway station, though he did not begin hauling from his own quarry (by carts as well as by traction engine) till May, 1903. The only way for such traffic to go was by the section of road in question. Long before the year 1902 the haulage of stone by traction engines had become common throughout England and Wales, and, though the evidence was conflicting, I find as a fact that both for long and short distances such traction was more economical than carriage by horses and carts, and that the prohibition to use such traction over the locus in quo is and will be, if continued, a trade loss to the defendant, especially as his rivals in the trade are combining to obtain a private railway line instead of using this main road, from the use of which line he will be excluded.

The trial lasted five days, and a number of witnesses were called before me on both sides. The evidence was of a conflicting character as to the nature and construction of the main road in question, as to the repairs done to it by the county council, as to the state of the road before May, 1902, when the haulage of stone was by carts and horses, as compared with its state after the use of the traction engine and trucks began, as to the sort of traffic which the county council might have expected to come upon the road, as to the effect of the use of the traction engine, and as to the state of the road between May, 1902, and the present time, and especially at the time when this action was commenced and the injunction against an alleged public nuisance asked for. The evidence, generally speaking, on the part of the county council was to the effect that the road had been a fairly good country main road fit for ordinary traffic, and that, though the stone haulage by carts and horses had made it rutty, it was not till the traction engine traffic began that it became very bad, and that especially through the wet year 1903 it got steadily worse, notwithstanding the efforts of the county council to keep it in repair, and that towards the end of 1903 it was almost impassable and was dangerous to life and limb. For the

defendant, on the other hand, the evidence was to the effect that the road before May, 1902, was already in a bad condition, that there was no such substantial change for the worse when the traction engine began to be used as alleged by the county council, but in some respects the traction traffic rendered it better by flattening the ruts, that the cause of the deterioration of the road was due partly to the weather and the ordinary traffic, but mainly to the neglect of the county council to repair it and, where necessary, to reconstruct it, and to the improper way in which they did at last begin to reconstruct it in October, 1902, and to the dilatoriness with which they carried out the reconstruction, not having even now finished it; that the road was not, in December, 1903, impassable or dangerous, and that no public nuisance existed, and that now that the reconstruction is nearly complete or, at least, when the reconstruction is complete, the road will be fit, if ordinary care is taken of it by the county council, for the resumption of the defendant's traction traffic without causing any damage to the road.

I think the evidence on the part of the relators was exaggerated, and that some of the witnesses, notably the rector of the parish, one of the chief movers in the matter, were actuated in a great measure by dislike of traction engines in general in regard to noise, smoke, and frightening of horses, incidents of the use of these engines, none of which in themselves (in the case of a properly constructed and driven engine), however distasteful to individuals, could probably at the present day be successfully made, nor were they in this case attempted to be made, the subject of an indictment or proceeding by the Attorney-General as for a public nuisance. The truth probably lies between the extreme views of the witnesses on either side. I am not satisfied that there was so great a change for the worse, dating from or from soon after the traction traffic began, as was alleged by the relators. But I think it is established that on December 7, 1903 (the date of the writ), and for some time previously the road had become, by a combination of causes to be mentioned presently, in a very rough and muddy condition and very incommodious

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for traffic of all kinds, rendering necessary the use of great care by the public, particularly at night, though in view of the fact that no accident was shewn to have occurred, notwithstanding that the traffic had continued over the road during the whole of the years 1902 and 1903, I am not satisfied that the road was at any time before action actually dangerous to life and limb. Nevertheless, I think the condition above described would, if primarily caused by the acts of the defendant, render him liable to be indicted for a public nuisance. See Hawkins, Pleas of the Crown, vol. i. 8th ed. p. 700 [the learned judge read the passage], and Russell on Crimes, vol. i. 6th ed. p. 785; see as to lawful acts done so as to become a nuisance, *Thorpe* v. *Brumfitt* (1); *Attorney-General* v. *Brighton and Hove Association* (2); *St. Helens Chemical Co.* v. *Corporation of St. Helens* (3); *Lambton* v. *Mellish* (4); see as to obstruction by traction engine in order to be indictable having to be substantially greater than that caused by carts, *Reg.* v. *Chittenden* (5), but it must benoted that in that case injury to the roadway was not established.

The condition of this road was, however, as I find as a fact, not caused primarily by the defendant's traction traffic, but partly by the traction traffic, partly by the continued stone haulage by carts and horses, partly by the ordinary traffic, and partly by the weather, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic, including the traction traffic, which was not more unusual or onerous than they ought to have expected to come upon it, and to the careless and dilatory way in which they proceeded with the reconstruction of the road decided upon by them in October, 1902, and as to part not yet finished. Also I find that though the difficulties of reconstructing the road by the county council were increased by the traction engine running on the partly completed road, they never asked the defendant to discontinue the use of the engine temporarily till they could complete the road; and, further, that now that the

(1) (1873) L. R. 8 Ch. 650.
(2) [1900] 1 Ch. 276.
(3) (1876) 1 Ex. D. 196.
(4) [1894] 3 Ch. 163.
(5) (1885) 15 Cox C. C. 725.

reconstruction is nearly completed very little, if any, damage would in future be done by the resumption of the defendant's traction traffic, and that when the reconstruction is completed, which, according to the statement of the county council, will be in a month from the last day of hearing (June 20), there will be no appreciable risk of the traction engine cutting up the reconstructed road, at all events not to the extent of rendering it (if ordinary care is used by the county council to keep it in repair) so dangerous or impassable or incommodious as to constitute a public nuisance.

Now after the decision of the Court of Appeal I think it is too late to argue (except in the House of Lords) that the 13th section of the Locomotive Act, 1861—namely, "Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of this Act, such indictment or action could be maintained"—applies only to nuisances other than those caused by injury to the highway as to which the Act prescribes a remedy by compensation for extraordinary traffic: see Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23. Nor do I think that even independently of the decision of the Court of Appeal such an argument could succeed, because before the Act a user in itself lawful might become a nuisance if exercised in such manner or with such frequency as to make the road dangerous. It was, however, urged by the counsel for the plaintiffs that the Court of Appeal intended to prevent the defendant from setting up the failure of the county council to provide and maintain a sufficient road as being the real primary cause of the mischief instead of his traction engine. On this point I think the Court of Appeal and Phillimore J. only intended to enforce the interim injunction in order to protect the public in a case of apparently imminent danger by prescribing the status quo pending the investigation of the facts and of the rights of the parties. I do not think, to take an extreme

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instance, in a case where the road authority is really wholly to blame for the road being unfit to bear the traffic which they ought to expect upon it, that the first person who brings any traffic upon it, however proper for the road as it ought to be, and in fact breaks it down because it is unfit, can be indicted for a nuisance as causing or creating it unless he does it deliberately, knowing that this will be or will probably be the result; still less that he can be in such a case perpetually enjoined in an action by the Attorney-General on the relation of the defaulting authority from ever bringing such traffic on the road again; nor do I think the Court of Appeal meant so to hold: see, as to the duty of the road authority to maintain the road according to an up-to-date standard, *Reg.* v. *Henley* (1); *Wallington* v. *Hoskins* (2), per Field J.; *Hemsworth Rural District Council* v. *Micklethwaite* (3), (cited to me from shorthand notes); *Reg.* v. *High Halden* (4); and as to an injunction not being granted unless it is just and equitable in such a case, see *Kirkheaton Local Board* v. *Ainley*. (5) It should not be forgotten that the county council might have placed restrictions upon the use of locomotives on the road by passing by-laws under s. 6 of the Locomotives Act, 1898 (61 & 62 Vict. c. 29). This they have not done.

Even if the defendant could have been rightly indicted or temporarily enjoined in respect of an intentional user by him of the road as it existed towards the end of 1903 so as to create a nuisance, although that nuisance would not have been caused but for the default of the highway authority, it by no means follows that when that defaulting authority has put or is putting the road into a proper state presumably fit for this traffic, the defendant should at his peril be perpetually enjoined from bringing this traffic upon it, when it is or ought to be so fit, as to create a nuisance. He ought not in my judgment to be perpetually enjoined, unless he has shewn an intention to continue to act unlawfully, which, as I find as a fact, he has

(1) (1847) 10 L. T. (O.S.) 110.
(2) (1880) 6 Q. B. D. 206, at p. 215.
(3) April 20, 1904.
(4) (1859) 1 F. & F. 678.
(5) [1892] 2 Q. B. 274.

not shewn. Whether he has been or will be liable to contribute specially to the maintenance of the road, owing to extraordinary traffic, is a question as to which I express no opinion. There was a further point taken by the defendant to the effect that the county council had made no definite complaint of the use of the traction engine from May, 1902, till October, 1903 (which is true), and that "laches" alone was an answer to this action. I incline to think, however, that the maxim, "Nullum tempus occurrit Regi," prevents laches by itself being successfully set up against the Attorney-General, and the case of *Attorney-General* v. *Sheffield Gas Consumers' Co.* (1) is not when examined an authority to the contrary. But for the reasons already given, and exercising my discretion in the matter, I think the perpetual injunction asked for should be refused.

As regards the counter-claim for a declaration as to the duty of the county council to repair the road to the extent mentioned therein, that counter-claim is not brought under the ægis of the Attorney-General, and is, on the contrary, set up against him. It was sought to be supported under Order xxv., r. 8, which, while not countenancing applications for declarations "in the air," yet does seem to sanction the granting of a declaration as to the future in cases where it is definite and useful. But it is not the practice to grant it if it is embarrassing or useless for any good purpose, and I think that is the case here, especially as the extent of the obligation of the county council may vary very considerably at different dates and under different circumstances. The defendant's counsel felt the force of these considerations, and ultimately agreed to raise his contention as to the duty of the county council by way of argument in opposition to the claim, and to drop it as a counter-claim. The counter-claim was accordingly treated by both parties practically as struck out, and I order it to be struck out without costs. As to the claim, I give judgment for the defendant with costs against the county council, refusing the perpetual injunction claimed, and so dissolving the interim injunction, subject only to the undertaking by the defendant

(1) (1853) 3 D. M. & G. 304.

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given to me in open Court that if the injunction were dissolved he would undertake not to use the road with his traction engine till the expiration of the month within which the county council say the reconstruction will be completed—namely, by the 20th July inst.—and I give liberty to apply.

W. J. B.

The plaintiffs appealed.

1905. Jan. 20, 23. *Asquith, K.C., Macmorran, K.C.*, and *J. R. Atkin*, for the plaintiffs.

Arthur Powell, K.C., R. Cunningham Glen, and *A. A. Bethune*, for the defendant, were not called upon.

Inasmuch as the decision turned mainly on questions of fact, it is considered unnecessary to report the arguments.

VAUGHAN WILLIAMS L.J. I think we cannot interfere with the findings of fact by the learned judge. The findings of fact upon the affidavit evidence, which were sufficient to justify the granting of the interim injunction, did not of course in any way determine what the findings were to be at the trial. One need not therefore be surprised that the Court of Appeal dealt with the evidence merely as primâ facie establishing a nuisance; but they expressly said that that finding was not to prejudice or prevent a full and untrammelled trial of the action when it should come to be heard at length on vivâ voce evidence.

The question is whether the evidence establishes that the defendant by the use of a traction engine of great weight, drawing trucks with heavy loads in them, has turned the road into a condition in which it is unfit for public user, or in which public user has been rendered substantially less convenient. [The Lord Justice read the findings of fact in the judgment of Jelf J., and continued:—]

Unless those findings can be displaced, the conclusion appears to me inevitable that it is not the fact that this traction engine has created a nuisance on the highway. It is not true that a public nuisance has been caused by the defendant, to quote the words of Collins M.R. in *Attorney-General* v. *Scott* (1), "by

(1) [1904] 1 K. B. at p. 407.

the use of traction engines of great weight drawing trucks of considerable weight with heavy loads in them" upon the road. No doubt every user by the public of a road with heavy traffic more or less affects the surface of the road. On these facts it must be taken that the traction engine more or less affected the surface of the road; but I can see nothing in the finding of Jelf J. or in the evidence that the use of the traction engine caused the condition of the road. There is nothing, as it seems to me, to lead us to the conclusion that the condition of the road was created specially by the traction engine. In my opinion the conclusion of the learned judge cannot be disturbed, and the appeal must be dismissed with costs.

ROMER L.J. and STIRLING L.J. concurred.

Appeal dismissed.

Solicitors: *Taylor, Rowley, Lewis & Davis, for H. S. Gustard, Newport, Monmouthshire; Hicks, Davis & Hunt.*

W. L. C.

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March 2, 3;
April 19.

WEINER *v.* GILL.
SAME *v.* SMITH.

Sale of Goods—Sale or Return—Sale for Cash only—Passing of Property—Pledge — "Act adopting the Transaction" — Sale of Goods Act, 1893 (56 & 57 *Vict.* c. 71), *s.* 18, *rule* 4.

The plaintiff, a manufacturing jeweller, delivered jewellery to H., a retail jeweller, on the terms of a memorandum headed "On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of W. [the plaintiff] until such goods are settled for or charged." H. being informed by L. that he had a customer who might buy the goods, delivered them to L. upon the terms of his paying cash or returning them in a few days. L. had no customer, and fraudulently pledged the goods with the defendant, a pawnbroker. In an action to recover the goods from the defendant:—

Held, that the goods were not delivered to H. "on approval, or on sale or return or other similar terms," within the meaning of s. 18, rule 4, of the Sale of Goods Act, 1893, and that even if they were, the pledging of them by L. did not amount to an act by H. "adopting the transaction"; that consequently the property did not pass out of the plaintiff by reason of the pledging, and that he was entitled to recover.

Bryce v. *Ehrmann*, (1904) 42 Sc. L. R. 23, distinguished.

TRIAL before Bray J. without a jury.

The plaintiff was a manufacturing jeweller carrying on business in Hatton Garden. The defendants in the first action were the executors of one Gill, a pawnbroker carrying on business at Hampstead Road in the county of London, and the defendants in the second action were the executors of a pawnbroker named Robinson carrying on business at Mortimer Street in the said county. The actions were for the delivery up of a diamond brooch, a diamond circular pendant, and a pair of diamond earrings belonging to the plaintiff, and wrongfully pawned with the defendant Smith by one Longman, and of a diamond necklace belonging to the plaintiff, and wrongfully pawned with the defendant Gill by the said Longman. The plaintiff had in the months of August and September, 1904, delivered these articles to one Huhn, a dealer in jewellery, upon the terms in each case of a note or memorandum bearing the following heading: "On approbation. On sale for cash only or return. From Samuel Weiner, Diamond Mounter and Manufacturing Jeweller. Goods had on approbation or on sale

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or return remain the property of Samuel Weiner until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession." The note specified the price at which the plaintiff was willing to sell the articles. Huhn delivered the articles to Longman, who was also a dealer in jewellery, upon the representation by Longman in the case of each article that he had a particular customer who was desirous of buying an article of that description, and he so delivered them to Longman upon the terms that Longman should pay immediate cash for them or return them in a few days. In fact, Longman had no customer for any of the articles, and he immediately on receiving them from Huhn pledged them with the defendants respectively, who advanced money on them in good faith. Longman was subsequently prosecuted by Huhn for larceny of the articles, but was acquitted.

Rawlinson, K.C., and *H. Dobb*, for the plaintiff.

J. A. Hamilton, K.C., and *C. Attenborough*, for the defendants. The contract between the plaintiff and Huhn was one of "sale or return," and the effect of the pledging by Longman was to cause Huhn to become the purchaser of the goods as between him and the plaintiff; for Huhn had delivered the goods to Longman under a similar contract of sale or return. And it has been held in the Court of Appeal that where a person who has received goods on sale or return pledges them he thereby does an "act adopting the transaction" within the meaning of the Sale of Goods Act, 1893, s. 18, rule 4. (1) So that the property

(1) By the Sale of Goods Act, 1893, s. 18, "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

"Rule 4: When goods are delivered to the buyer on approval or 'on sale or return,' or other similar terms, the property therein passes to the buyer—(*a*) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction."

Sect. 21, sub-s. 1: "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

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in the goods passes to him, and the original vendor cannot recover them from the person with whom they have been pledged: *Kirkham* v. *Attenborough*. (1) Therefore, upon the goods here being pledged with the defendants, Longman became the purchaser of them as between him and Huhn, and Huhn, having so dealt with the goods that it was no longer in his power to return them to the plaintiff, had in his turn done an "act adopting the transaction" between him and the plaintiff, so that the property passed out of the plaintiff to him, and through him to Longman, and Huhn's only obligation to the plaintiff was to pay the stipulated price. The fact that by the terms of the plaintiff's approbation note the goods were to remain the property of the plaintiff until they were "settled for or charged" did not affect Huhn's power to pass the property. That clause was designed to protect the plaintiff's interest in the goods only so long as they remained in Huhn's possession undealt with. In the case of *Bryce* v. *Ehrmann* (2), where articles of jewellery were delivered on the terms of an approbation note which contained a clause that they should remain the property of the vendor "until invoiced," and the buyer pawned them while still uninvoiced, it was held that the object of that clause was only to keep up the vendor's right to them while they were in the buyer's hands, or if they fell into the hands of the buyer's creditors, and that it did not invalidate the pledge. That case is on all-fours with the present, except that here the note contains the additional words "for cash only." But those words are immaterial to the present contention. All that the parties intended by those words was that the sale was not to be upon long credit, and that Huhn, who was known to be buying for the purpose of reselling, was to sell for cash and was to pay the plaintiff immediately upon effecting the sub-sale. But it was never intended that Huhn should be unable to pass the property to his purchaser without first paying the price to the plaintiff; for that would have involved the plaintiff attending at the time of the sub-sale for the purpose of receiving his price out of the money paid by the sub-purchaser, and from a business point of view that would have been quite impracticable.

(1) [1897] 1 Q. B. 201. (2) 42 Sc. L. R. 23.

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Secondly, if the contract was not one of sale or return within the meaning of s. 18, the plaintiff is estopped from denying Longman's authority to pledge the goods, and the defendants acquired a good title under s. 21, sub-s. 1. It is so usual in the jewellery trade for articles of jewellery to be handed to a succession of persons on the terms of sale or return, that the plaintiff must have known when he let Huhn have the goods that he would offer them to persons who in turn would offer them to other persons in the ordinary way of the trade, which includes sale or return. By his parting with the possession of the goods the plaintiff misled the defendants into the belief that Longman either was the owner of them or had them on sale or return, and consequently was entitled to pledge them. Delivery of possession by the owner confers on the recipient all such authority and title to deal with the goods as is incident to the transaction in which the possession is delivered. Thus it has been held that a bailee of a sewing machine under a hire-purchase agreement can by depositing it at the cloak-room of a railway station confer on the railway company a lien for the cloak-room charges as against the owners of the machine: *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (1) And in *Brown* v. *Marr* (2), where a retail jeweller in pursuance of a fraudulent scheme obtained jewellery from wholesale dealers on contracts of sale or return, and systematically pawned it, it was held that the pawnbrokers were entitled to retain the goods as against the wholesale dealers, one of the grounds of the decision being that "a purchaser or pledgee is not bound to look beyond the ostensible title of possession, and that if the true owner have knowingly conferred this ostensible title, although induced thereto by fraud, a bonâ fide purchaser cannot be required to restore what he has bought, on the ground of latent stipulations between the seller and his author."

Rawlinson, K.C., in reply. It was the clearly expressed intention of the plaintiff that the property in the jewellery should not pass until he received cash for it. The case of *Bryce* v. *Ehrmann* (3) is bad law, and, not being binding in this Court,

(1) [1894] 1 Q. B. 833. (2) (1880) 7 R. 427. (3) 42 Sc. L. R. 23.

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should not be followed. Moreover, that case is distinguishable, for there the goods were in fact invoiced to the pawnor subsequently to the pawning, and it became immaterial to consider whether the property had passed at an earlier date. With regard to the question of estoppel, it is clear that mere delivery of possession to another does not amount to a representation to all the world that that person is the owner of the goods, or has authority to deal with them as if he were the owner: *Farquharson* v. *King*. (1) Moreover, s. 21, sub-s. 1, of the Sale of Goods Act, 1893, applies only to sales by the person in possession; it has nothing to do with pawning.

Cur. adv. vult.

April 19. BRAY J. In this case the plaintiff sought to recover four articles of jewellery, one a diamond necklace of the value of 170*l*., from the executors of a pawnbroker named Gill, and three others—a diamond brooch, a diamond circular pendant, and a pair of earrings, of the value of 205*l*.—from the executors of another pawnbroker named Robinson. The defendants resisted the claim on the ground that the goods had been validly pledged to them by one Longman. The case is one of considerable importance to pawnbrokers, and indeed to jewellers, and, having regard to the recent decision in the Scotch Court in the case of *Bryce* v. *Ehrmann* (2), of some difficulty, and therefore, although I had formed a strong opinion in favour of the plaintiff during the arguments, I thought I ought to give it further consideration and put my reasons in writing.

The plaintiff was a manufacturing jeweller and diamond merchant, and was originally the owner of all four articles. In the months of August and September, 1904, he handed these articles to one Huhn on the terms of a special approbation note which had this printed heading: "On approbation. On sale for cash only or return. From Samuel Weiner, Diamond Mounter and Manufacturing Jeweller. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged. The consignees

(1) [1902] A. C. 325. (2) 42 Sc. L. R. 23.

are responsible for these goods until they are returned to my possession."

I find as a fact that the note contained the true and only terms between the parties. Below the heading the article was described, and the price named at which Huhn had the option of buying it. Huhn had been known to the plaintiff for some twenty-five years. He had formerly been in a very good position in the trade, but at this time he was not a man of means, and was in the habit of taking goods on approbation to resell to his customers. In each case within a short time of receiving the goods from the plaintiff Huhn handed them to Longman. Longman had been known to Huhn for many years. He had been a shopman in two different shops, but at this time was a dealer in jewellery in a small way, having no place of business except his residence, and was known by Huhn not to be a man of any means. In each case Longman represented to Huhn that he had a particular customer who wanted to buy the particular article, and the article was handed to him by Huhn that he might offer it to this particular customer. He was to pay immediate cash, or return the article in a day or two. In fact, in no case had Longman any customer, nor had he any previous communication with any customer. He had pledged other articles with the defendants which he desired to redeem, and in each case he obtained the goods from Huhn that he might pledge them with the defendants in substitution for articles which he desired to withdraw. He never shewed or offered the articles to any customer, and never intended to do so, and in each case he pledged the goods with the defendants either on the same day or within a day or two of the day when he received them from Huhn, and he intended to misappropriate them at the time when he obtained them from Huhn. When Huhn called upon Longman to return the goods, Longman told him that his customer was still considering whether he would buy. Eventually Huhn prosecuted Longman for larceny. He was committed for trial, and the jury acquitted him.

The following are the facts with reference to the pledging. The goods were taken in by the respective managers of the

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two defendants from Longman. No question whatever was asked by either of them as to Longman's title to the goods, and Longman made no representation at all as to his title. In the case of both defendants Longman had pledged jewellery with them before, and gave them goods in substitution for jewellery which they already had in pledge. In Gill's case Longman had throughout given a false name and a false address, namely, George Howard, 79, Calabria Road, but no inquiries had been made to ascertain if it was correct. When the goods were claimed, but not before, the manager looked in the directory, and found there was a 79, Calabria Road, but no name of Howard appeared. He said he took Howard to be a dealer in jewellery in a large way because he brought so many articles to be pledged, and this gave him confidence, and therefore he asked no questions. In Robinson's case Longman gave his correct name and address, but the manager asked him no further questions. He judged from his transactions that Longman was a dealer in jewellery. In neither case do I find that the pawnbrokers abstained from asking questions because they believed or suspected that anything was wrong. They both bonâ fide thought Longman had the right to pledge the goods, and they were content to run the risk without making any special inquiries or asking for any proof of title; but it certainly was a careless and, as one of them said, an unusual mode of doing business. The plaintiff first learnt that the goods had been pledged from Huhn's solicitor. He had been demanding back his goods from Huhn for some time previously, but Huhn had put him off by saying that they were still in the hands of his customer, who had not decided whether he would buy them. On learning that they had been pledged with the defendants the plaintiff demanded their return from the defendants, who refused to deliver them up, and he then commenced two actions, which were consolidated by consent. The defence was the same in both cases—(1.) that the goods had ceased to be the property of the plaintiff when Longman pledged them, and that Longman had either title or authority to pledge them; (2.) that if this was not so, the plaintiff was estopped by his conduct from denying it. These

two questions must be considered separately, and I will take the first point first.

The question whether the property passed must depend in the first instance on the contract between the plaintiff and Huhn. I have found that the printed note contained the terms of the contract. Are these the statutory "sale or return" terms? By statutory I mean the terms stated in rule 4 of s. 18 of the Sale of Goods Act. In my opinion they are not. Under the statutory terms an option is given by the seller to the intending purchaser to buy the goods on credit. He can elect to buy, or, as the statute says, can adopt the transaction in three ways—(1.) by signifying his approval or acceptance to the seller or by paying the price; (2.) by doing some act indicating that he elects to be purchaser, or inconsistent with his being other than the purchaser; (3.) by retaining the goods beyond the stipulated time, or, if no time is stipulated, beyond a reasonable time. This is pointed out by Lopes L.J. in *Kirkham* v. *Attenborough*. (1) Under the terms of the note in question Huhn could, in my opinion, only exercise the option of buying by bringing cash to the plaintiff. The note says, "On sale for cash only," and the subsequent words make this quite clear, for the goods are to remain the property of the plaintiff until they are settled for or charged. The words "or charged" apply to a case where the plaintiff has by some subsequent act expressed his willingness to give credit, as by debiting the purchaser. He is not bound to give credit, but if he does the property passes. In my opinion it was the clear intention of the parties not to contract on the ordinary or statutory "sale or return" terms, and that no right should be given to Huhn to buy except he brought cash. It is argued by Mr. Hamilton that business would be impossible if these were the terms, because Huhn's customer would not pay cash if he knew that Huhn could not pass the property to him. I can understand this difficulty arising; but it does not appear ever to have arisen, and the parties do not seem to have considered how it should be met. In practice it could easily be met by the plaintiff's representative attending when Huhn's customer

(1) [1897] 1 Q. B. 201.

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paid cash to receive his share of the cash. It appeared in evidence that when the customer proposed to give a bill the plaintiff had to be consulted and to approve before the transaction could be carried out, and the plaintiff could be consulted in case the suggested difficulty arose. It does not alter my opinion that the parties had no intention that the property should pass till the plaintiff received his cash. It was perfectly open to the parties to so agree, and I think they did so agree. If, contrary to my opinion, some exception or condition ought to be implied to meet the suggested difficulty, I cannot see why such exception or condition should be wide enough to make the property pass in case of a pledge. I think one of the objects of the special terms was to provide that the property should not pass in such a case, as it was held in *Kirkham* v. *Attenborough* (1) it did under the ordinary "sale or return" terms.

I am referred to the case of *Bryce* v. *Ehrmann*. (2) It is true that in that case some of the learned judges expressed the opinion that in the case of a somewhat similar note the object was only to protect the goods while they were still in the hands of the dealer, and that if the dealer found a purchaser the owner was bound to let him have them at the stipulated price. The note there contained no such words as "on sale for cash only," and it is sufficient for me to say that I rely on those words here; but I cannot help expressing a doubt whether the learned judges were right in construing the note before them as they did. There seems, however, to have been good ground for their decision against the plaintiff in that case, as he had in fact invoiced the goods to the dealer and agreed to take bills from him. As there is no pretence for saying that the goods here were either settled for or charged, I hold no property passed from the plaintiff.

But Mr. Rawlinson further argues that if the terms between the plaintiff and Huhn were the statutory terms of sale or return, yet the property did not pass here. He argued that Huhn had done no act adopting the transaction, that by delivering the goods to Longman for a special purpose he had

(1) [1897] 1 Q. B. 201. (2) 42 Sc. L. R. 23.

not signified his acceptance, nor had he done any act inconsistent with the plaintiff being still the owner, and that he could not be said to have retained the goods as their misappropriation by Longman was not with his consent. I think this argument is sound. I think, assuming in favour of the defendants here that there was a contract between Huhn and Longman, it was not the intention of the parties that the property should pass except in the event of Longman selling and paying cash, which he never did; and, in my opinion, the property never did pass to Longman, and Huhn did no act as between him and the plaintiff adopting the transaction. It seems to me unnecessary to find that Longman was guilty of larceny. If I had to consider that question, I should not feel bound by the verdict of the jury who acquitted Longman. I should have to decide it on the evidence before me. On these grounds, therefore, I must hold that the property never passed out of the plaintiff, and the defendants' first point fails.

I come now to the second part—namely, that even though no property passed from the plaintiff, the plaintiff has by his conduct estopped himself from denying it. Now the general rule of law is stated clearly by Lord Herschell in *London Joint Stock Bank* v. *Simmons* (1): "The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn a good title is acquired by personal estoppel against the true owner." I have, therefore, to ask myself, What has the true owner done to mislead the defendants into the belief that Longman had authority to pledge the goods? The plaintiff made no express representation to any one except by giving the "approbation note," but that did not represent that he had parted with the property. Quite the contrary.

(1) [1892] A. C. 201, at p. 215.

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If the defendants had asked for proof of title, the only proof forthcoming would have been the "approbation note," which would have told them that no property passed without cash payment, and no receipt had been produced. But the defendants did not ask for proof, and did not rely on any representation of the plaintiff or on any document. They relied on former dealings between themselves and Longman, and on Longman's possession. I think they relied mainly on the former dealings, but with these dealings the plaintiff had nothing to do. So far as appeared from the evidence, none of the plaintiff's goods had been pledged with the defendants before. It comes to this, therefore, that the only conduct of the plaintiff on which the defendants can rely is that Longman had possession, which may be said to have been caused by the plaintiff having parted with possession to Huhn. I asked for some authority to shew that parting with possession alone was conduct which estopped the person so acting from setting up his title. No authority could be produced. It seems to be an absurd proposition. The statement of the law by Lord Herschell presupposes that the owner has parted with possession, and yet he says that it must be shewn that the owner has acted so as to mislead. I think this implies that there must be something more than the mere parting with the possession. If it were true that merely parting with possession was sufficient, there would be no necessity at all for the Factors Act. Indeed, the Factors Act would have limited instead of extending estoppels. Why should mere parting with possession create an estoppel? Why should the defendants assume that because Longman had possession he had authority to pledge, when every one must know that in the ordinary course of business owners of goods are every day parting with possession without authorizing the person to whom possession is given to pledge? Business could not go on if it were so. No one would be safe in parting with the possession of anything. Mr. Hamilton suggested that there was some peculiarity in the jewellery trade—namely, that it was a very common practice to deliver jewellery on sale or return. But the defendants did not know or ask whether the goods were delivered on sale or return, or what were the

circumstances under which the plaintiffs, or whoever were the true owners, had parted with them. Mr. Hamilton relied on some observations in *Brown* v. *Marr*. (1) But that case on the facts was the same case as *Kirkham* v. *Attenborough* (2), and any observations made by the judges on the estoppel point were certainly not adopted in *Mitchell* v. *Heys*. (3) But however that may be, they are clearly overruled in my opinion by the principles laid down by the House of Lords in *Farquharson* v. *King*. (4) It is sufficient for me to refer to the judgments of the learned Lords in that case without repeating them. They are absolutely inconsistent with the doctrine that the mere parting with possession will create an estoppel. But if I look at the merits, who has been guilty of indiscretion or carelessness here? Which party has caused the loss? Surely the defendants, who have chosen to advance money on goods brought to them without a single inquiry of any sort or kind. It may well be that the business is so profitable that pawnbrokers can afford to run the risk; but I fail to see that that gives them any right to throw the loss on the plaintiff. It would certainly not be to the advantage of the community that pawnbrokers should be encouraged to make advances on goods without having first made most careful inquiries. In my opinion there is no estoppel here, and the plaintiff is entitled to recover all the four articles claimed.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. A. White.*
Solicitors for defendants: *Attenborough & Son.*

(1) 7 R. 427.
(2) [1897] 1 Q. B. 201.
(3) (1894) 21 R. 600.
(4) [1902] A. C. 325.

J. F. C.

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Jan. 20;
April 13.

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Marine Insurance—Sale of Goods c.i.f.—Policy effected for Amount in excess of Value of Goods—Payment by Underwriters of whole Amount Insured—Title of Seller or Buyer to the excess Insurance Money.

A contract for the sale of goods at a price to cover cost, freight, and insurance contained the clause—"Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers." Subsequently to the sale the sellers effected a policy for a larger amount than 5 per cent. over net invoice, and handed that policy together with the shipping documents to the buyers in exchange for the price. A loss having occurred under the policy, the underwriters paid the buyers upon the whole amount insured:—

Held, that the buyers were not, to the extent to which the money received by them from the underwriters exceeded the amount of their loss, trustees for the sellers, but were entitled to retain it to their own use.

MOTION to set aside an award.

By a contract dated November 3, 1903, Messrs. Landauer bought from Messrs. Asser 250 bales of Manila hemp to arrive at the price of 35*l.* 10*s.* per ton cost, freight, and usual f.p.a. insurance. The contract contained the following clause: "Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers under an f.p.a. policy on usual Lloyd's conditions at Lloyd's, or with a London insurance company having a responsible and well-known London agent." The 250 bales were invoiced to Messrs. Landauer on May 3, 1904, as shipped per SS. *Peleus*. The hemp had been bought by Messrs. Asser from Messrs. F. E. Coney & Co., the shippers, who had insured it under a floating policy of insurance dated April 29, 1904, for 25,616*l.* on hemp per steamers from Philippines to United Kingdom, by a declaration thereunder of even date of 1280*l.* on 250 bales of hemp so valued per SS. *Peleus* to London. On May 4 Messrs. Landauer paid to Messrs. Asser the invoice amount of 1054*l.* 13*s.* 9*d.*, and received in exchange the shipping documents, together with the above declaration of insurance. The *Peleus* arrived in London about May 4, 1904, and discharged the said 250 bales in due course into the dock company's sheds, and while there about 160 bales,

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part of the 250 bales, were destroyed by fire. Messrs. Landauer claimed under the insurance as for a total loss of the 160 bales. The underwriters were prepared to pay the claim upon basis of the insurance being for 1280*l.* But Messrs. Asser claimed to be entitled to a share of the insurance money to the extent to which 1280*l.* exceeded the amount of the net invoice plus 5 per cent. Messrs. Landauer disputed this claim, and the matter was referred to arbitration. The two arbitrators, being unable to agree, nominated Mr. H. K. Bibby as umpire, who made his award in the following terms: "Having been asked to act as umpire on the question as to the liability and interest in the policy of insurance appertaining to 250 bales Manila hemp per *Peleus*, I decide that as the parties to the contract dated November 3, 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent., and that the buyers are therefore entitled to and only to the said amount, the balance one way or the other being due from or to the sellers." Messrs. Landauer moved to set aside the said award upon the ground that it was bad on the face of it.

Leck, for Messrs. Landauer. Where goods are sold for a price to cover cost, freight, and insurance, the purchaser is entitled to the benefit of any insurance which is in fact effected on the goods, even if that insurance is for an amount larger than that which under the contract he could require. In *Ralli* v. *Universal Marine Insurance Co.* (1) policies for 7000*l.* were effected on a cargo of wheat valued at that amount; the cargo fell in value, and was sold while afloat for 5358*l.*, the price to include all shipping documents, freight, and insurance. The cargo was lost by perils insured against, and the underwriters paid the whole of the insurance money into court. It was held that the purchasers, having bought the wheat as insured at a value set on it by the vendors, were entitled to the whole of the insurance money, and not merely to a sufficient portion of it to indemnify them against their loss. That authority covers the present case.

(1) (1862) 31 L. J. (Ch.) 313.

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J. A. Hamilton, K.C., and *Gover*, for Messrs. Asser. The purchasers are only entitled under their contract to a sufficient insurance to cover the price at which they bought. The contract was not for the transfer of existing insurances at the date of the sale, but of insurances "to be effected." Therein lies the distinction between this case and *Ralli* v. *Universal Marine Insurance Co.* (1) There the policy in question was already in existence at the date of the sale, and it may be that under those circumstances the parties must be taken to have intended the existing contracts of insurance to be treated as part of the subject-matter of the sale. Knight Bruce L.J. laid stress on the fact of the policy being in existence before the agreement of sale was made. The fact that a declaration for an amount in excess of what would have satisfied the contract was handed to Messrs. Landauer was due to a mistake on the part of a clerk. If the mistake had been the other way, and the declaration had been for too small an amount, the vendors under their c.i.f. contract would have had to make up the balance; conversely, in the present case they are entitled to the benefit of the excess. Further, the award ought not to be set aside, for there is no question of law in dispute. What insurances the parties intend to be transferred under such a contract is a question for the jury—*Tamvaco* v. *Lucas* (2)—and therefore one of fact.

Leck, in reply. No distinction can be drawn between the case of a contract for the transfer of existing insurances and that of a contract for the transfer of insurances to be effected. Messrs. Asser can have no title to recover any part of the insurance money, for the interest of the party claiming from the underwriters must exist at the time of the loss. "If the assured, before the termination of the adventure, has parted with all interest in the subject-matter of the insurance, he can suffer no damage from any subsequent loss; and consequently from the nature of the contract being one of indemnity, he cannot recover in respect of any loss subsequent to his transfer of the property": per Blackburn J., *Lloyd* v. *Fleming*. (3) It

(1) 31 L. J. (Ch.) 313.
(2) (1862) 3 B. & S. 89.
(3) (1872) L. R. 7 Q. B. 299, at p. 302.

follows that if there had been here an express reservation of the excess insurance to Messrs. Asser, it would have been void as being a wagering contract.

Cur. adv. vult.

April 13. LORD ALVERSTONE C.J. This was a motion to set aside an award made by Mr. Bibby, an umpire appointed under an arbitration clause in a contract of sale of November 3, 1903. The only ground on which it is alleged that the award should be set aside is that the arbitrator has gone wrong in point of law, and that the error in law appears upon the face of the award. There is no doubt whatever that if this can be established the award ought to be set aside: see *Hodgkinson* v. *Fernie*. (1)

The contract of sale was dated November 3, 1903, and made between Messrs. Landauer, as purchasers, and Messrs. Asser & Co., as sellers, of 250 bales of Manila hemp at the price of 35*l*. 10*s*. per ton cost, freight, and usual f.p.a. insurance. The shipment was to be made from the Philippine Islands, Hong Kong, or Singapore to London between January 1 and March 31, 1904. The contract contained the following clause: "Should the hemp or any portion thereof not arrive in London from loss of vessel or other unavoidable cause, this contract to be fulfilled for such portion by handing documents including insurance policy against payment of invoice; but should the hemp or any portion thereof be transhipped and arrive in any other vessel or vessels for account of the original sellers, the contract shall hold good for such portion. Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers under a f.p.a. policy on usual Lloyd's conditions at Lloyds, or with a London insurance company, or with a company having a responsible and well-known London agent."

At the time of the contract there does not appear to have been any policy in existence. The goods were paid for on May 4, 1904, and on that day the purchasers, Messrs. Landauer, received from Messrs. Asser & Co. the shipping documents,

(1) (1857) 3 C. B. (N.S.) 189.

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including an undertaking dated April 29, 1904, in the following terms:—

"The Manager, Hong Kong and Shanghai Banking Corporation.

"Sir,—In pursuance of instructions from F. E. Coney & Co., of Muscovy House, E.C., by whose order we as their brokers effected a policy of insurance for 25,616*l.* on hemp per steamers from Philippines to U.K. Cont. and bearing date April 29, 1904, now remaining in our hands to hold the same as far as relates to the interests declared on such policy as per declaration of 1280*l.*, say, one thousand two hundred and eighty pounds on 250 B/ hemp so valued per SS. *Peleus* to London as a security for your bank to protect its interest in the subject-matter of the above declaration to the extent of 1280*l.*, and we thereby hold such policy to the extent of the above declaration for your bank free from any lien on our part on the policy.

"We are, Sirs,

"Yours, &c.,

"G. Duncan & Co.

"p. P. A. Dundas."

Some word is omitted in the above document, but it was treated before us as an undertaking to hold the amount of 1280*l.* therein mentioned. This sum of 1280*l.* was in excess of the net invoice amount plus 5 per cent., which it is agreed would amount to 1107*l.*

After the arrival in Liverpool about 160 bales of the goods were injured by fire while in the warehouses at the docks. A claim was made by Messrs. Landauer upon the insurance company, who as I understand made a payment on account to them of 75 per cent., and were prepared to pay over according to the terms of the undertaking the balance of the amount due upon the basis of the whole parcel being insured for 1280*l.* Before, however, the remaining 25 per cent. was so paid over, the sellers, Messrs. Asser & Co., claimed that they were entitled to receive such amount of the insurance money as represented the difference between 1107*l.*, that is the net invoice amount plus 5 per cent., and 1280*l.*

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The matter was referred to arbitration pursuant to the supplementary clauses of the contract. The only one of the supplementary clauses which seems to have any bearing upon the matter is clause 5: "The evidence and proceedings upon arbitrations may be taken in a mercantile way without regarding legal technicalities respecting evidence." Mr. Bibby made his award in the following terms: "Having been asked to act as umpire on the question as to the liability and interest in the policy of insurance appertaining to 250 bales Manila hemp per *Peleus*, I decide that as the parties to the contract dated November 3, 1903, were by the terms thereof the principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent., and that the buyers are therefore entitled to, and only to, the said amount, the balance one way or the other being due from or to the sellers." It is alleged on behalf of Messrs. Landauer & Co. that the award is bad because it decides that the buyers are only entitled under the contract to such amount of the insurance money as represents the net price plus 5 per cent., and that the balance is due to Messrs. Asser. It is alleged on behalf of Messrs. Asser that the question to be decided by the umpire was one of mercantile usage, and that he was entitled to say, under the contract, that the interest of Messrs. Landauer was limited to the extent of the purchase-money plus 5 per cent., and that as against Messrs. Landauer the sellers, Messrs. Asser, were entitled to receive from the underwriters and retain the difference between the amount of the insurance and the amount of the net price plus 5 per cent. The umpire appears to have decided, so far as we can gather from his award, that under the contract of November 3 the purchasers are, as against the sellers, not entitled to claim more than 1107*l.*, even though the policies handed over in pursuance of the contract were intended to be so handed over as a discharge of the sellers' obligation to deliver the policy of insurance. This seems to me to be an error in point of law. If policies are handed over by the sellers under such a contract, the interest in them passes wholly to the purchasers, and, assuming the underwriters to pay on

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those policies the amount insured, I do not see under what right the sellers are entitled to claim that the purchasers are trustees for them of any portion of the money so recovered. The sellers, Messrs. Asser & Co., had at the time of the loss no interest in the subject-matter of the insurance, and could not upon the facts assumed have made any valid claim against the underwriters, and if the underwriters pay they must be taken to have paid to the persons who were entitled to the goods at the time of the loss. The only reason stated in the award for a different conclusion is that the parties to the contract were principals and not brokers, and the award states that the buyers are therefore entitled only to the value plus 5 per cent. This seems to me to be immaterial except possibly for the purpose of excluding any question of the right of the sellers, or purchasers, respectively to represent the interests of third parties. I can see no other bearing that it has upon the question. Although not directly in point, the case of *Ralli* v. *Universal Marine Insurance Co.* (1) supports the contention that under such a contract policies, which are in fact handed over in discharge of the sellers' obligations, are to be treated as belonging to the purchasers. For these reasons I think the award should be set aside and the appeal allowed.

KENNEDY J. I concur in the judgment which my Lord has just delivered; but it is right, as the case is somewhat peculiar, that I should state as shortly as may be the reasons of my decision in favour of Messrs. Landauer. It is unnecessary to recapitulate the facts which appear in the affidavits filed by the parties on this motion. There is not really any conflict as to those which are material. We are called upon to decide whether the award made by Mr. Bibby, acting as umpire in the arbitration held under the provisions of the contract of purchase dated November 3, 1903, ought or ought not to be set aside for error of law appearing upon its face. It is clear that such error affords good ground for setting aside an award: *Hodgkinson* v. *Fernie*. (2) It appears to be clear also that

(1) 31 L. J. (Ch.) 313. (2) 3 C. B. (N.S.) 189.

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Messrs. Asser & Co. had not at the time of the loss and of the insurance any insurable interest in the goods insured. They could claim from the underwriters nothing for themselves. The underwriters have paid to Messrs. Landauer & Co., who were the owners of the insured goods at the time of the loss, 75 per cent. of the amount due in respect of the insurance, and are willing to pay to them the balance. That balance has not as yet been paid, only because Messrs. Asser have interfered and put forward a claim that, as between themselves and Messrs. Landauer, it belongs to them. The case comes before us in a somewhat awkward form, because the underwriters are not parties to the arbitration or bound by the award. In these circumstances, seeing that Messrs. Asser & Co. can have no valid legal claim against the underwriters, I ought, I think, to treat the case as if the underwriters had paid, as they are willing to pay, to Messrs. Landauer the full amount covered by the policy of insurance, and as if Messrs. Asser & Co. were suing Messrs. Landauer & Co. in respect of so much of the money paid by the underwriters to Messrs. Landauer & Co. as represents the difference between the amount recoverable by the assured under a policy for 1280*l.* and the amount recoverable under a policy which would satisfy the contract of November 3, 1903.

The umpire's award as to this difference, which for brevity's sake I will call "the sum in dispute," runs as follows: [The learned judge read the terms of the award.] The reasoning of the umpire, which he puts forward in the expression "as the parties to the contract, &c., were by the terms thereof principals thereto," is, as counsel for both parties seemed to agree, far from clear. I do not understand how in any case the facts help Messrs. Asser. But whatever this expression means it is, I think, quite clear that the umpire bases his decision that Messrs. Asser, the sellers, are, and Messrs. Landauer, the buyers, are not entitled to the sum in dispute, entirely upon the terms of the contract of November 3, 1903. Therefore, unless that contract, properly construed, justifies the umpire's conclusion, the award is upon the face of it bad in point of law. Is there then anything in the contract of November 3, 1903,

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which would constitute Messrs. Landauer in respect of the sum in dispute trustees of it for Messrs. Asser; or anything which would make that sum, when received by them, money had and received for Messrs. Asser? It appears to me that unless one or other of these two propositions can be established Messrs. Asser's claim fails and the award must be set aside.

In my judgment the contract does not afford good ground for the maintenance of either of these propositions. It is a c.i.f. contract for the purchase of 250 bales of Manila hemp, to be shipped by steamer or steamers from the Philippine Islands, Hong Kong, or Singapore to London. Insurance for 5 per cent. over net invoice amount was to be effected by the sellers, Messrs. Asser & Co., for account of buyers, Messrs. Landauer & Co. Messrs. Landauer admittedly performed their duties as buyers, and at the time of the loss of a part of the goods by fire were the only parties who had any interest in the goods. I will assume that, as alleged by Mr. W. Asser in his affidavit, Messrs. Asser would have correctly and sufficiently performed their duty in regard to the provisions of the contract as to insurance if they had with the bill of lading handed over to Messrs. Landauer a covering letter as described by him in that affidavit. The effect of this, as I suppose, would have been that Messrs. Asser, retaining the original undertaking of the underwriters which they, when buying, had received from the importers, would, upon the loss occurring, have collected the insurance money for Messrs. Landauer, the only parties having a legal claim against the underwriters at the time of the loss, and that Messrs. Landauer could have claimed, as a matter of legal right, from the underwriters through Messrs. Asser only an amount equal to 5 per cent. over the invoice price and no more. I will assume also that, as now alleged by Mr. W. Asser in the same affidavit, it was owing to a mistake, in the sense of a deviation from the ordinary course of business, on the part of their clerk that Messrs. Asser, instead of sending the covering note, gave to Messrs. Landauer, as in performance of their duty under the contract in respect of insurance, the original undertaking of the importers' underwriters for the larger sum of 1280*l*.

What is there in the contract to justify in these circumstances a claim on the part of Messrs. Asser, whose property in the goods and insurable interest had, as I have already said, passed to Messrs. Landauer before the time of the loss, that Messrs. Landauer are trustees for them in respect of any part of the insurance money, whatever be the amount, which may be paid to Messrs. Landauer by the underwriters? Or, because, if they handed over to Messrs. Landauer, not the original undertaking, but only the covering note for the smaller amount, Messrs. Landauer would not have been able to insist on receiving from the underwriters through Messrs. Asser so much as they are willing to pay them, to justify a claim that the surplus is money received to their, Messrs. Asser's, use? It appears to me that in regard to the claim of Messrs. Asser to the sum in dispute the alleged mistake of their clerk does not assist them. As I understand the facts, they do not lose a penny to which otherwise they would have had a valid legal claim because Messrs. Landauer receive from the underwriters more than they, Messrs. Landauer, might otherwise have received. The fact that Messrs. Landauer in consequence of the alleged mistake receive, because for some reason the underwriters are willing to pay it, a larger sum than they would have received if Messrs. Asser had merely satisfied the contractual requirements as to the insurance in the usual way, could in my opinion clothe Messrs. Asser with either a legal or an equitable right to the surplus only if there is to be found in the contract an express or implied undertaking by, or obligation of, Messrs. Landauer, in case of an insurance claim arising, to hold any sum which they might receive in respect of insurance beyond 5 per cent. over the invoice price for the use or benefit of Messrs. Asser. I am unable to find any such stipulation expressed or implied in the contract.

Mr. Hamilton, in his able argument on behalf of Messrs. Asser, insisted much upon the fact that this was a mercantile arbitration, and that the umpire might properly give effect to a mercantile usage. But the award expressly and implicitly founds its conclusion upon the terms of the contract of November 3, 1903, and makes no reference to custom or usage; and,

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further, it is difficult to see how there could be a custom or usage applicable to a set of circumstances which, according to Mr. Asser's affidavit, has arisen, not in accordance with the ordinary course of business in the performance of the contract, but out of a clerk's mistake which has created a peculiar and abnormal state of affairs.

The only case cited to us which appears to have any real bearing upon the present is that of *Ralli* v. *Universal Marine Insurance Co.* (1) In that case a cargo of grain from the Black Sea had been insured with the defendants under two policies, and was sold afloat when the market was low, and consequently at a depreciated price, including insurance. The vendors indorsed one of the policies for its full value to the vendee, and the other for about half of the amount insured in it, making together the amount of the depreciated selling price of the grain. The cargo was lost, and the vendee claimed to receive from the underwriters the whole amount covered by both policies. The vendors thereupon sued the vendee and the underwriters, claiming a declaration that as to the amount secured by the last-named policy there was as to half the amount thereby insured a trust in their favour. The underwriters paid the whole amount of the insurance into court, and the litigation proceeded. The decision is not directly in point here, because the judgment of the Lords Justices was largely influenced at least by the fact that in that case the policies had been effected before the time of the contract of sale, and, in their view, the stipulations in the contract of sale as to insurance were to be read as referring to those existing policies; whereas in the present case the undertaking which represents the insurance was not given until some months after the contract of sale. On the other hand, the position of the vendor was in that case in one respect stronger than that of Messrs. Asser & Co. here, because he had, as I have said, indorsed over one of the policies to the vendee only for about half the amount insured in it, and it was claimed, therefore, on his behalf that he had in this way expressly reserved to himself as against the vendee an interest to the extent of a

(1) 31 L. J. (Ch.) 313.

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half of the policy. In view of this plain reservation on the part of the vendor in respect of this policy, it is noticeable that the editor of Arnould on Marine Insurance, 4th ed. pp. 308, 309, commenting upon the case, says: "The defendants (the underwriters) had paid the full amount into court in the first instance; if they had not adopted this course and the judgment of the learned Vice-Chancellor against the vendee's claim had been affirmed, it is difficult to understand upon what principle in law the *vendor* would have based his claim to the balance."

My view is that as the award wrongly decides that in point of law under the contract Messrs. Asser have a title to the sum in dispute, it is bad in point of law and must be set aside. As I have already pointed out, the underwriters are not parties to the arbitration proceedings or to this litigation, and it is therefore neither open to us, nor indeed necessary, to say whether, in paying Messrs. Landauer, as we are assured the underwriters are willing to do, they are doing what Messrs. Landauer could as against them have required as a matter of legal right.

RIDLEY J. Having had the advantage of reading the judgment of the Lord Chief Justice, I beg to say that I entirely concur in it.

Award set aside.

Solicitors for Messrs. Landauer & Co.: *Dommett & Son.*

Solicitors for Messrs. Asser & Co.: *Waltons, Johnson, Bubb & Whatton.*

J. F. C.

1905
May 22.

EVERALL *v.* BROWN.

County Court—Practice—Remitted Action—Discretion of Judge as to Costs—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113.

Sect. 65 of the County Courts Act, 1888, which provides that in the case of remitted actions "the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts," does not take away the general discretionary power of the judge over the costs.

APPEAL from Ludlow County Court.

The action was brought in the High Court to recover a sum of 40*l.*, the price of certain cows sold by the plaintiff to the defendant. Judgment was obtained under Order XIV. for 21*l.* 18*s.* 9*d.* and costs, and leave to defend was given as to the balance of 18*l.* 1*s.* 3*d.*, the action being remitted to the county court. In the county court the plaintiff recovered only 8*l.* 1*s.* 3*d.* on the claim, and the defendant recovered 7*l.* 8*s.* 9*d.* on a counter-claim; so that on the whole result a balance of 12*s.* 6*d.* only was due from the defendant to the plaintiff. Under those circumstances the judge held that he had a discretion as to the costs of the proceedings in the county court, and that the proper way to exercise that discretion was to award no costs. From that order as to costs the plaintiff appealed.

Disturnal, for the plaintiff. The judge had no jurisdiction to make the order. There is no discretion over costs in remitted actions. Sect. 113 of the County Courts Act, 1888, which gives the Court a general discretion, limits it to cases "not herein otherwise provided for." Costs of remitted actions are otherwise provided for, for s. 65 says expressly that the costs of the parties "shall be allowed" according to certain scales. Secondly, assuming that the judge had a discretion, his exercise of it was founded on a double mistake in law. He thought (1.) that the proceedings in the High Court and those in the county court were two separate proceedings, and (2.) that

the claim and counter-claim constituted only one matter, so that in his view the two parties recovered practically the same amount respectively, and, if nothing were said about costs, would get their costs taxed on the same scale, namely, the "lower scale," applicable to sums recovered under 10*l.* Whereas in fact the proceedings in the High Court and in the county court are all one proceeding: *White* v. *Headland's Patent Electric Storage Battery Co.* (1); so that what the plaintiff really recovered in the action was 30*l.* And, further, separate judgments ought to be entered on the claim and counter-claim, and not one judgment for the balance. If, therefore, no special direction had been given, the result would have been that the plaintiff would have had his costs taxed on the B scale, as having recovered upwards of 20*l.*, and the defendant would have had his costs of the counter-claim taxed on the lower scale.

Micklethwaite, for the defendant. The decision of the Court in *Aston Tube Works, Ld.* v. *Dumbell* (2) proceeded upon the assumption that the county court judge had a discretion in remitted actions. Lord Alverstone C.J. there said: "It must, I think, be admitted that, if the action is an action in the county court, the judge has a discretion under s. 113. In my opinion the action when transferred to the county court must be conducted in the same way and with the same consequences as if it had been commenced in that court, and s. 113 applies."

LORD ALVERSTONE C.J. In my opinion this appeal must fail. If the county court judge had any discretion to make the order which he did, I do not think we ought to interfere with his exercise of it. In the proceedings in the county court the plaintiff recovered 8*l.* 1*s.* 3*d.*, and the defendant recovered on his counter-claim 7*l.* 8*s.* 9*d.*, and under those circumstances the judge said that the proper way to exercise his discretion was to award no costs. It is true that in giving his reasons for so exercising it he stated that the plaintiff succeeded only to the extent of 12*s.* 6*d.* But all that he meant by that was that that was the practical result of the two cross-claims. He must not be taken as having lost sight

(1) [1899] 1 Q. B. 507. (2) [1904] 1 K. B. 535.

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of the fact that the claim and counter-claim were separate events, the costs of which would in the absence of a special direction have to be dealt with separately. Then had he a discretion over the costs, the action being a remitted action? Sect. 113 provides that "the costs of any action or matter in the Court not herein otherwise provided for shall be paid by or apportioned between the parties in such manner as the Court shall think just." I can see no reason why the general discretion given by that section should not apply to remitted actions as well as to actions commenced in the county court. But it is said that s. 65 provides otherwise with respect to remitted actions, with regard to which it says that "the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county court." It is contended that that section is imperative both as to the scale and also as to the allowance. In my opinion that is not so. It is nothing more than a direction to the taxing officers as to the scale which they shall apply in taxing the costs, if costs are allowed at all, and if no special direction is given by the Court that they shall apply some other scale. It does not in any way fetter the discretion of the judge. This seems clear from the latter words of the section—"and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court." The words there used are the same—"shall be allowed." But it could not be suggested that with respect to those proceedings the High Court had not a discretion over the costs. The effect of these sections was considered in *Aston Tube Works, Ld.* v. *Dumbell.* (1) I there expressed the opinion that where a case is remitted to the county court the judge has the same discretion under s. 113 as if the action had been commenced in the county court. And Wills J. in his judgment also proceeded upon the assumption that the judge had a discretion. It is true that that expression of opinion was not necessary to the decision, as there the county court judge's order did not purport to be founded on an exercise of

(1) [1904] 1 K. B. 535.

his discretion; he meant the costs to follow the ordinary rule, and mistook the scale of costs which according to that rule was applicable. But although that opinion was obiter I adhere to it now.

KENNEDY J. I am of the same opinion. In substance the decision of the county court judge meant that, looking at the result of the claim and counter-claim, he thought it was a case in which he ought to disallow any costs on either side. Then was he entitled to do that? I think he was. I agree with what was said by my Lord in *Aston Tube Works, Ld.* v. *Dumbell.* (1) I think the language of s. 65 was not intended to interfere with the discretion of the judge over the costs of the part of the proceedings which took place in his court. All it means is that where no special direction is made the costs of the portion of the proceedings in the High Court shall be taxed on the High Court scale, and those of the portion in the county court upon the county court scale.

RIDLEY J. I am of the same opinion. I think the county court judge had a discretion.

Appeal dismissed.

Solicitors for plaintiff: *Jaques & Co., for C. B. Cottam, Ludlow.*

Solicitor for defendant: *W. C. Tyrrell, Ludlow.*

(1) [1904] 1 K. B. 535.

J. F. C.

1905
Feb. 2.

MILE END GUARDIANS *v.* SIMS.

Poor Law—Pauper—Disobedience to Lawful Order—"Misbehaviour"—Poor Relief Act, 1815 (55 *Geo.* 3, *c.* 137), *s.* 5.

Wilful disobedience by a pauper of a lawful order of a workhouse official is not necessarily "misbehaviour" within the meaning of s. 5 of the Poor Relief Act, 1815.

CASE stated by a metropolitan police magistrate.

The respondent had been charged on an information under 55 Geo. 3, c. 137, s. 5, alleging that he, being a person maintained in a public workhouse, had been guilty of misbehaviour.

At the hearing it appeared that in 1892, under the authority of 12 & 13 Vict. c. 103, s. 14, as amended by 39 & 40 Vict. c. 61, s. 22, the appellants, with the sanction of the Local Government Board, entered into a contract with the Kensington guardians whereby able-bodied paupers chargeable to the appellants might be received and maintained in the workhouse belonging to the Kensington guardians. The respondent was admitted to the appellants' workhouse at Mile End on August 31, 1904, and, being an able-bodied pauper, was on the following day ordered to go to the workhouse of the Kensington guardians at Notting Hill; at the same time an order for admission was handed to him to take with him. The respondent, however, refused to go to the Notting Hill workhouse, saying that he would go to Blackheath; when he got in the street he left the workhouse official who was to have accompanied him to Notting Hill. The respondent did not go to the Notting Hill workhouse, but on September 3 was admitted to the Mile End workhouse and again became chargeable to the appellants. He was then given into custody and charged before a magistrate under s. 5 of the Poor Relief Act, 1815, with being guilty of misbehaviour. (1)

(1) By 55 Geo. 3, c. 137, s. 5, "And whereas persons maintained in public workhouses sometimes refuse to work, or are guilty of drunkenness and other misbehaviour, and by the laws in being no sufficient punishment is provided for such offences: be it therefore enacted, that in case

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The appellants contended that the respondent's wilful disobedience to a lawful order of an officer of their workhouse was misbehaviour within the section.

The magistrate held that the misbehaviour must be ejusdem generis with drunkenness, and that disorderly, violent, and offensive conduct was meant, and he was fortified in his opinion by the fact that refusal to work was made a specific offence, which would have been unnecessary if disobedience to an order was misbehaviour. Further, provision was made in case of disobedience by art. 127 of the General Consolidated Order of July 24, 1847, by which any pauper who, being an inmate of a workhouse, shall wilfully disobey any lawful order of any officer of the workhouse is to be deemed disorderly, while under art. 129 the master may punish disorderly paupers by restrictions as to diet. He therefore dismissed the information.

R. Cunningham Glen (*A. A. Bethune* with him), for the appellants. The order to go to the Kensington workhouse was a lawful order, and disobedience to it was misbehaviour within the meaning of s. 5 of the Poor Relief Act, 1815. The magistrate was wrong in construing the words "other misbehaviour" as being ejusdem generis with drunkenness; if that doctrine is applicable, they are rather ejusdem generis with refusal to work. Misbehaviour must, in the ordinary sense of the word, include a wilful refusal to obey a lawful order of an officer of the guardians; the word does not necessarily import conduct of the kind usually called disorderly, but includes all breaches of discipline. The remedy given by the General Consolidated

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any person or persons, maintained in any public workhouse or workhouses established for the relief, maintenance, and employment of the poor, shall refuse to work at any work, occupation, or employment suited to his, her, or their age, strength, and capacity, or shall be guilty of drunkenness or other misbehaviour, every such person or persons, being thereof lawfully convicted before any justice or justices of the peace, shall thereupon by such justice or justices of the peace be committed to the common gaol or house of correction, there to remain without bail or mainprize for any period of time not exceeding twenty-one days, and during such time to be kept to hard labour."

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Order of 1847 was merely intended to give the master of the workhouse power to deal once for all in a summary way with less serious cases. [He also referred to 54 Geo. 3, c. 170, s. 7.]

The respondent did not appear.

LORD ALVERSTONE C.J. I am of opinion that the view taken by the learned magistrate is correct. We are asked to apply to the present state of facts a section of an old statute making "misbehaviour" in a workhouse a criminal offence, without regard to the fact that that legislation was passed at a time when things were very different, when there was only one workhouse in which a pauper from a particular parish could lawfully be maintained, and when no question of his removal from one workhouse to another, or of his refusal to go from one workhouse to another, could possibly arise. Sect. 5 of the Poor Relief Act, 1815, deals, as appears from the preamble as well as from the enacting part of that section, with persons maintained in public workhouses who refuse to work at any work suited to their age, strength, and capacity, or are guilty of drunkenness or other misbehaviour, and a person who refuses to do such work or is guilty of such misbehaviour can be taken before a justice or justices and sent to prison for twenty-one days with hard labour. It is in my opinion quite obvious that there are many cases of misbehaviour, not necessarily of the nature of drunkenness, such as being guilty of outrageous or improper conduct while in the workhouse, which would make the man who committed them disorderly, and which a Court would be justified in treating as cases of misbehaviour within the meaning of s. 5. But we are now being asked to extend that section to the case of a pauper whose offence consists in wrongfully objecting to go to and live in another workhouse to which he may legally be sent. We find orders promulgated at a much more recent date which provide a wholly different penalty, and declare that paupers who wilfully disobey a lawful order are to be deemed disorderly, and that they may be punished by restrictions as to diet. It would, I think, be straining the language of s. 5 if we were to hold that such an act of disobedience as the

present comes within it and is punishable as a criminal offence by a sentence of hard labour. There is an obvious alternative and appropriate remedy by which such harsh consequences may be avoided, and I think, therefore, that this appeal should be dismissed.

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KENNEDY J. and RIDLEY J. concurred.

Appeal dismissed.

Solicitor for the appellants: *C. V. Whitgreave.*

W. J. B.

GUARDIANS OF WOOLWICH UNION, APPELLANTS *v.* GUARDIANS OF FULHAM, RESPONDENTS.

1905
April 13.

Poor Law—Settlement—Illegitimate Child—Residence of Child under Sixteen with Parent—Acquisition of Settlement while under Sixteen—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A child, whether legitimate or illegitimate, living with a parent, cannot while under the age of sixteen acquire for itself an independent settlement. *West Ham Union* v. *Holbeach Union*, [1903] 2 K. B. 627; [1904] 2 K. B. 121, discussed.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

On May 13, 1904, the respondents obtained an order under the hands and seals of two justices of the county of London, whereby it was adjudged that the parish of Charlton-next-Woolwich in the Woolwich Union was the place of the last legal settlement of five children named Johnson, properly Turpin, namely, Alice, aged about fourteen; Maude, aged twelve; John, aged nine; Queenie, aged eight; and Dorothy, aged about six years, paupers chargeable to the parish of Fulham, and the appellants were ordered to receive and provide for the paupers. The appellants gave due notice of appeal to the quarter sessions for the county of London, and the appeal was duly entered, and by consent of the parties and by order of a judge at chambers the present case was stated, the parties

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agreeing that judgment in conformity with the decision of the Court should be entered at quarter sessions.

CASE.

1. In or about the year 1880 William Turpin married Rosa Clark.

2. In or about the year 1884 Rosa Turpin left her husband, and went away and cohabited with John Johnson, by whom she had the following children: Emily, aged about sixteen; Alice, aged about fourteen; Maude, aged twelve; John, aged nine; Queenie, aged eight; Dorothy, aged six; and Mabel, aged about three years. William Turpin had not since 1884 contributed in any way towards the maintenance of Rosa Turpin. All the children were registered in the register of births as the children of John Johnson.

3. The children respectively lived with John Johnson and Rosa Turpin in the parish of Lambeth, first at 134, Poplar Walk Road, where the child John was born; then at 273, Shakespeare Road, Herne Hill, where the child Queenie was born; then at 97, Effra Parade, where the children Dorothy and Mabel were born. The residence of John Johnson and Rosa Turpin in the parish of Lambeth continued without break and without relief from the guardians for a period exceeding three years.

4. During the same period William Turpin resided for a term of three years and upwards at 32, West Street, in the parish of Charlton-next-Woolwich in the Woolwich Union, in such manner and under such circumstances as made him irremovable therefrom and settled therein.

5. In the year 1903 the paupers became chargeable to the parish of Fulham, having resided there not quite a year.

7. The appellants affirmed that the said Alice, Maude, John, Queenie, and Dorothy Johnson, otherwise Turpin, acquired a legal settlement in the parish of Lambeth by reason of the residence therein of John Johnson and Rosa Turpin mentioned in paragraph 3, or by reason of the residence of the paupers for upwards of three years prior to 1901 in such manner and under such circumstances in each of the years as would, in

accordance with the provisions of the several statutes in that behalf, render them irremovable therefrom.

8. The respondents affirmed that the paupers took their mother's settlement, which was the settlement acquired by William Turpin under the circumstances mentioned in paragraph 4.

9. The question for the opinion of the Court was whether upon the facts stated in the case the paupers were settled in the parish of Charlton-next-Woolwich in the Woolwich Union, or not.

Rawlinson, K.C. (*Cox-Sinclair* with him), for the appellants. The justices were wrong in holding that the paupers took their mother's derivative settlement in the Woolwich Union. In the first place it is submitted that they had acquired a settlement for themselves in Lambeth by residence there for three years under such circumstances as to make them irremovable. Under 9 & 10 Vict. c. 66, s. 3, no child under the age of sixteen, whether legitimate or illegitimate, residing with its father or mother, stepfather or stepmother, or its reputed father, is removable where the person with whom it resides is not removable. In the present case the reputed father could not be removed from Lambeth, and it is contended that the children could not be removed from that union if they were still living there. Having acquired a status of irremovability in Lambeth, s. 34 of the Divided Parishes Act, 1876, applies, and they acquired a settlement for themselves by residence under that section. The recent decision of *West Ham Union* v. *Holbeach Union* (1) is an authority for the proposition that a child under sixteen, whether legitimate or illegitimate, may acquire a settlement by residence for itself. It is true that in that case the pauper was over sixteen at the date of the inquiry, but the whole of the three years' residence was while under that age, and would have been equally available for the acquisition of a settlement had the pauper been still under the age of emancipation.

[KENNEDY J. If a child above the years of nurture who

(1) [1904] 2 K. B. 121.

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lives for three years in a place becomes irremovable and acquires a settlement, I am unable to see the necessity for the elaborate provisions of s. 35 as to the settlements of children.]

The judgment of Wills J. in *West Ham Union* v. *Holbeach Union* (1) is in terms an authority for the proposition that a child can while under sixteen acquire a settlement for itself by residence. The case of *Reigate Union* v. *Croydon Union* (2) is not against the contention of the appellants, though the respondents will doubtless rely upon the judgment of Lord Watson as shewing that by residence with its mother a child under sixteen cannot acquire a settlement in its own right. The appellants also rely upon the residence with the reputed father. The word "person" in s. 34 of the Divided Parishes Act, 1876, includes a "child." There is no good reason for suggesting that a child under sixteen who becomes irremovable by reason of three years' residence cannot make use of the settlement acquired through this irremovability until after it has reached the age of sixteen, for the settlement of the child cannot depend upon whether the point is taken before or after it attains that age. There is nothing in s. 34 of the Divided Parishes Act, 1876, to exclude children from its operation and so to prevent their acquiring settlements of their own by residence, nor is its operation limited by the provisions of s. 35.

Secondly, if the paupers have not acquired a settlement for themselves, they follow their mother's settlement, and if that is a derivative settlement from her husband it is the settlement which he had before they separated in 1884; she does not derive from him the fresh settlement acquired by him after the separation.

Thirdly, as the husband did not contribute to the support of his wife and children after 1884, there was desertion on his part, and the wife acquired a settlement of her own in Lambeth: *Reg.* v. *Maidstone Union.* (3) [He also cited *East Retford Union* v. *Strand Union* (4); *Reg.* v. *Cudham.* (5)]

(1) [1903] 2 K. B. 627; [1904] 2 K. B. 121.
(2) (1889) 14 App. Cas. 465.
(3) (1879) 5 Q. B. D. 31.
(4) (1862) 3 B. & S. 122.
(5) (1859) 1 E. & E. 409.

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Macmorran, K.C. (*George Humphreys* with him), for the respondents. The order of removal made by the justices was right. As regards the last point, the mother cannot be treated as a deserted wife who has acquired a settlement of her own; a woman who has left her husband must be taken to have the settlement of her husband and of no one else. On the main point, the result would be the same whether the children were legitimate or illegitimate. If they are legitimate, they take their father's settlement under s. 35 of the Divided Parishes Act, 1876; they take their mother's settlement if illegitimate, and they take it none the less because it is the mother's settlement derived by her from her husband. The language of Lord Watson in *Reigate Union* v. *Croydon Union* (1) is precise and express; he says that the first clause of s. 35 "puts an end to all nice questions of emancipation or non-emancipation, by enacting that on attaining the age of sixteen every child shall, without regard to its physical or mental capacity, cease to follow its parent's settlement and become capable of acquiring a settlement in its own right"; there are other passages in his judgment to the same effect, and he throughout puts legitimate and illegitimate children on the same footing. The principle applicable to the settlement of unemancipated children is further illustrated by the case of *West Derby Union* v. *Atcham Union* (2), where it was held that the prohibition in s. 35 of the Divided Parishes Act, 1876, against inquiring into the derivative settlement of a parent had no application to the case of children under sixteen, who were capable of taking their mother's derivative settlement. The provision of s. 3 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), upon which the appellants rely, has no application to the present case, for the mother of the paupers was always removable. [He also referred to *Manchester Overseers* v. *St. Pancras Guardians*. (3)]

Rawlinson, K.C., in reply. Sect. 3 of the Act of 1846 was passed in order to stop the splitting up of families, and prevents an illegitimate child from being taken away from its actual father with whom it resides. It is not suggested that a child

(1) 14 App. Cas. 465, at p. 482. (2) (1889) 24 Q. B. D. 117.
(3) (1879) 4 Q. B. D. 409.

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under sixteen acquires the settlement of its reputed father, but that by living with him it acquires a settlement on its own behalf.

LORD ALVERSTONE C.J. In this case an order has been made by justices for the removal of certain illegitimate children under the age of sixteen to the Woolwich Union, and the argument presented to us is that the order is wrong on the ground that the children have acquired a settlement elsewhere. During the argument it occurred to me that the question might be dealt with merely as a question of preventing the removal under s. 3 of 9 & 10 Vict. c. 66, but for the reasons given by the counsel for both parties I think that such a decision would not deal adequately with the case, and that we must put a construction upon ss. 34 and 35 of the Divided Parishes Act, 1876.

If, as we must assume, the summary given by Lord Watson in *Reigate Union* v. *Croydon Union* (1) of the state of the law and the legislation on this matter is correct (and I think that I should independently have come to the same conclusion), certain propositions appear to be defined with reasonable clearness—namely, that in the Divided Parishes Act the Legislature did not mean to interfere with the settlement of children under sixteen; that so far as legitimate children are concerned, a child under sixteen has the settlement of its parent; and that under s. 71 of 4 & 5 Will. 4, c. 76, an illegitimate child has its mother's settlement up to the age of sixteen. That being so, it is unnecessary to trouble ourselves with the complicated question introduced by the counsel for the appellants founded on the fact that in addition to the mother the reputed father was living with the children; that might have been a matter for consideration if it had not been necessary for us to deal with the question of settlement, but now that we have to deal with that question we are bound to hold that legitimate children have the settlement of their parents and illegitimate children that of their mother. Unless, therefore, there is something in the circumstances of the present case which takes it out of the ordinary rule, these children have the settlement of

(1) 14 App. Cas. 465.

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their mother, which, as she was not a deserted woman, was her husband's settlement. It was not disputed for the appellants that a wife ordinarily takes her husband's settlement, but it was suggested that the wife in this case was a deserted wife, and had therefore acquired a settlement in Lambeth in her own right; but upon examination of the facts stated in the case it is clear that, even if the question of desertion were raised, there are no facts from which we should be justified in assuming that there had been desertion by the husband. We must therefore consider the case from the point of view that the mother has the settlement of her husband from whom she is separated, and that illegitimate children under the age of sixteen have their mother's settlement; if, therefore, the appellants' counsel cannot satisfy us that these children have acquired an independent settlement of their own, this order is good.

The question we have to decide is whether the effect of ss. 34 and 35 of the Divided Parishes Act, 1876, is such as to enable children under the age of sixteen to acquire a settlement in the sense that the settlement so acquired will or may affect their status before they actually attain that age. There is no doubt that s. 34 purported to give a settlement to persons who had become irremovable under certain circumstances, but whether it was intended to include the case of children living with a reputed father who could not himself give them a settlement seems to me extremely doubtful; at any rate, it is sufficient for the present purpose to say that there was a very large class of persons who had become, or would become, irremovable as the result of previous legislation, and who would therefore be deemed to have acquired a settlement by virtue of the operation of s. 34. Unless, therefore, the word "child" in s. 35, sub-s. 3, is to be construed to apply to children under sixteen, the main argument of the appellants is practically cut away. I agree that the statute itself, which begins by destroying and goes on to re-enact, is difficult to construe. There is no doubt that children under sixteen are referred to in paragraph 3 of s. 35, and that illegitimate children are referred to in paragraph 2, and, as a mere question of construction, it

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is difficult to say why the expression "any child" should not include all classes of children; one argument, however, has been adduced which may possibly explain the reason for the use of that expression. The fact that the section has previously dealt separately with legitimate and illegitimate children is one reason for using the words "any child" in paragraph 3. But we have the distinct opinion of Lord Watson that the provisions of the last clause of s. 35 "have no application to children under the age of sixteen, and do not qualify the preceding enactment of s. 35 to the effect that a legitimate, or that of 4 & 5 Will. 4 to the effect that an illegitimate, child shall continue to retain its parentage settlement until it has reached that age. The clause assumes that the children whose settlements are the subjects of inquiry are not unemancipated but are paupers in their own right and capable of acquiring a settlement for themselves." Whether Lord Watson's judgment went further than this it is unnecessary to consider; his extraordinary acumen and wonderful power of crystallizing the arguments presented to him are well known, and we have here his distinct opinion that this enactment relates to paupers who are emancipated and are capable of acquiring a settlement in their own right, together with a statement that the statute does nothing to qualify the clear existing statutory enactment as to the settlement of children living with their parents.

I felt some difficulty during the argument owing to the decision in *Manchester Guardians* v. *St. Pancras Guardians* (1), which was a distinct decision that these very words do not apply to derivative settlements. If that were so, and if the language of the section is to be held to apply to direct settlements only, and therefore to exclude the case of the mother's settlement, a question of great difficulty would have arisen; but it is clear that that decision is quite inconsistent with the judgment of Lord Watson, and I think that he probably had that case among others in his mind when he said that he would not go through the cases, as they were inconsistent. Therefore upon the construction of the sections, as interpreted

(1) 4 Q. B. D. 409.

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by the judgment of Lord Watson, I think that the respondents are right in their contention that s. 35 does not enable children under the age of sixteen to acquire an independent settlement.

But it was said on behalf of the appellants that we intended to decide this very question in the case of *West Ham Union* v. *Holbeach Union* (1), and certain passages in the judgments of myself and my brother Wills were relied on, which taken by themselves would no doubt warrant the placing of a wider interpretation on this section. The present point, however, was not suggested to us during the argument of that case, nor was it necessary that it should be; we were not then dealing with the case of children under sixteen, and the particular sections as to the settlement of children under that age were only referred to historically for the purpose of seeing what was the position of children in regard to the acquisition of settlements; that decision, therefore, is not an authority in a case where the children are under sixteen at the time of inquiry. It illustrates the importance of construing cases with reference to their subject-matter and of avoiding the use of expressions which may bear too wide a meaning. When that case came before the Court of Appeal, it may perhaps have been more fully argued than in the Divisional Court, but, whether or not the point was present to the minds of the learned judges, there are unquestionably several passages in the careful and elaborate judgment of the Master of the Rolls which shew clearly that he was confining his decision to the bearing of the previous residence during the unemancipated period on the status of a person who at the time of the inquiry had become emancipated. He says (2): "The case therefore appears to be an authority that the residence of a child in a parish with its parent while unemancipated—for it is impossible to suggest that the pauper in that case was emancipated during her father's lifetime—may be relied on as conferring on that child after emancipation the status of irremovability": obviously meaning, as indeed he was careful to say, not that residence while under sixteen gave the status at once, but only after the age of emancipation had been attained. Again, he says (3):

(1) [1903] 2 K. B. 627; [1904] 2 K. B. 121.

(2) [1904] 2 K. B. at p. 128.

(3) [1904] 2 K. B. at p. 129.

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"he puts together the period of the pauper's residence while unemancipated and that of her residence while emancipated, and says nothing from which it can be implied that, if the whole period of residence had been prior to the pauper's attaining the age of sixteen, it would not have been equally effective, on the question arising after she had attained that age, whether by that residence she had acquired a settlement." And further down on the same page he says: "I have been unable to find in s. 34 any provision, express or implied, to the effect that an emancipated child claiming a settlement under its provisions is not to have the benefit of residence whilst it was under the age of sixteen," a quotation from the judgment of the Lord Chancellor in *Reigate Union* v. *Croydon Union* (1), and other passages might be mentioned. Then Romer L.J. says (2): "The principle which appears to be there laid down is that a child, after attaining the age of sixteen, may claim to have acquired a settlement, by reason of residence for three years in a parish, before attaining that age." I refer to these judgments because, although the point was not raised before the Divisional Court, it is pressed upon us that we decided that an unemancipated child at once acquired a settlement independently of its mother by reason of its residence for the period necessary to give a status of irremovability. There are, however, many arguments against such a view, for reliance must necessarily be placed upon the statutory provisions which regulate the acquirement of a status of irremovability, and, as my brother Kennedy pointed out during the argument, those provisions cannot be called into operation if these children have acquired an independent settlement by virtue of residence for a year. It may be true that the family would not necessarily all go together, the children with the father and mother, but they will not be split up according to the individual settlements acquired by them, as they would be if the appellants' contention were well founded.

In my opinion, therefore, s. 35 was not intended to deal with the settlement of children, legitimate or illegitimate, under the age of sixteen, but only with the effect of such residence on emancipated children; the cases undoubtedly support that

(1) 14 App. Cas. 465, at p. 486. (2) [1904] 2 K. B. at p. 131.

view, and the positive enactment that illegitimate children are to retain their mother's settlement up to the age of sixteen is still binding on us. It being admitted that the mother had the settlement of her husband, it follows that the order appealed from was right.

KENNEDY J. I am of the same opinion. I will only say that, notwithstanding the careful argument on behalf of the appellants, their case is practically gone unless it can be made out that a child living with its parent for the period within the Act of 1876 can, even before the age of emancipation, acquire an independent settlement. Upon that point I will only say that I entirely concur in the view expressed by my Lord. In my opinion, no authority compels us so to hold, and a decision to that effect would be both unreasonable and inconvenient. Accepting therefore the somewhat difficult explanation given by so great an authority as Lord Watson of the language which the Legislature has thought proper to adopt in the third clause of s. 35, and treating that language as referring only to persons who have already attained the age of emancipation, I think that this appeal fails, and should be dismissed.

RIDLEY J. I agree. The learned counsel for the appellants was obliged to contend, and did very forcibly contend, that these children acquired a settlement for themselves by reason of their three years' residence with their parents in Lambeth. But all of them were unemancipated—all were under sixteen. When the authorities upon the interpretation of s. 35 are carefully considered, I think we must necessarily come to the conclusion that this contention fails. Had there been no previous authority, I certainly think that the point raised would have been a very arguable one; but the judgment of Lord Watson in *Reigate Union* v. *Croydon Union* (1) is wholly inconsistent with the appellants' contention, and I agree that the order appealed from was right.

Appeal dismissed.

Solicitors for appellants: *Callard & Vulliamy.*
Solicitor for respondents: *T. Blanco White.*

(1) 14 App. Cas. 465.

W. J. B.

1905
April 14.

NOBLETT *v.* HOPKINSON.

Licensing Acts — Offences — Opening Premises during Prohibited Hours — Delivery on Sunday of Goods purchased on Saturday—Appropriation of Goods sold—Licensing Act, 1874 (37 & 38 *Vict.* c. 49), *s.* 9.

Two men went into a public-house on Saturday before closing time, and asked if they could have half a gallon of beer and if it could be delivered the next morning to them at the place where they were working; on being told that they could, they paid for the beer. The beer was directly afterwards drawn and put into a bottle, which was kept during the night in a building within the curtilage of the licensed premises, and was taken by the barman on the Sunday morning during prohibited hours and delivered to the purchasers. A charge against the licensee under s. 9 of the Licensing Act, 1874, of unlawfully opening his licensed premises for the sale of intoxicating liquor during prohibited hours on Sunday, having been dismissed by justices:—

Held, that there had been no sufficient appropriation of the beer to the purchasers on the licensed premises on the Saturday, and that the licensee ought to have been convicted.

Pletts v. *Beattie*, [1896] 1 Q. B. 519, distinguished.

Held, further, by Lord Alverstone C.J. and Kennedy J. (Ridley J. dissenting), that, assuming there had been a complete appropriation of the beer on the Saturday, the licensee was nevertheless liable to be convicted, on the ground that delivery of the beer on Sunday was an essential condition of the purchase, and that by opening his premises on that day for the carrying out of a material part of the contract of sale he had opened them during prohibited hours within the meaning of s. 9.

Per Ridley J.: Assuming that there had been a complete appropriation of the beer on the Saturday, its delivery on Sunday formed no part of the contract of sale.

CASE stated by justices for the borough of Bury.

An information had been laid by the appellant against the respondent under s. 9 of the Licensing Act, 1874, charging that he, on November 6, 1904, then being a licensed person for the sale of intoxicating liquors by retail in his house and premises, did unlawfully open his licensed premises for the sale of intoxicating liquor during part of the time that they were required to be closed, to wit, at 7.55 o'clock on Sunday morning.

At the hearing it was proved that the respondent was a licensed victualler and held an alehouse licence in respect of

certain premises occupied by him for the sale by retail of intoxicating liquor to be consumed either on or off the premises. On Sunday, November 6, 1904, about 6 A.M., two constables concealed themselves in a stable within the curtilage of the licensed premises, and about 7.55 A.M. they saw a man named John Westbrook, the respondent's barman, come out of the respondent's premises by the back door with a gallon bottle of beer half full, and go out at the backyard door on to Bury Ground in the direction of the fire-hole of Spencer & Cuerdale's works, and when close to the fire-hole the constable stopped him and asked him what he had in the bottle, and he replied that he had half a gallon of beer for John Doherty and Walter Shedwell. Westbrook shouted for Doherty and Shedwell, and they came out from the fire-hole, and Doherty said that the beer belonged to him and Shedwell, and they had paid for it the night before.

It was explained on behalf of the respondent (which explanation the magistrates accepted as a fact) that on the preceding day, Saturday, November 5, the two men Doherty and Shedwell were engaged cleaning flues at Bury Ground, and went to respondent's house during the time his licensed premises were allowed to be open, when Doherty asked the respondent if he could have half a gallon of beer, and if it could be sent down to them on Sunday morning. Doherty paid for the beer, and directly afterwards, before closing time, half a gallon of beer was drawn and put into a bottle belonging to the respondent, and then corked and put on the bar counter by the respondent's son, and subsequently taken by him about closing time to the brewhouse stable within the curtilage of the licensed premises, whence it was taken by him on the Sunday morning and given to the barman behind the counter in the licensed premises to deliver to the two men. The respondent admitted that at the time of the sale of the beer on the Saturday he agreed to deliver the beer during prohibited hours on the Sunday to Doherty and Shedwell, and that the beer was delivered during prohibited hours on the Sunday by the barman.

It was contended for the appellant that neither the beer nor the bottle was specially appropriated to the purchasers, and

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that the transaction was not completed until delivery was made on the Sunday, which it was submitted was a material part of the transaction of sale, and that under the circumstances the respondent had opened his house for the sale of intoxicating liquor on the Sunday within the meaning of s. 9 of the Licensing Act, 1874.

The justices were of opinion that the sale of the beer was complete by payment for, and appropriation of, the specific goods on the Saturday, and they found as a matter of fact that the beer was paid for, drawn, put in a bottle, corked up, and set aside and specifically appropriated on that day, and that the property in the goods passed under that contract, and that in delivering the beer on the Sunday during prohibited hours the respondent did not open his house for the sale of intoxicating liquors within the meaning of s. 9 of the Licensing Act, 1874. They therefore dismissed the information.

The question of law arising upon the above statement of facts was thus set out: "Were we right under the circumstances in holding that, intoxicating liquor having been ordered of the respondent, paid for, and specifically appropriated during the time his licensed premises were allowed to be open, the fact that the beer was delivered by him through his barman during the period during which his premises were required to be closed constituted no offence of opening his house for the sale of intoxicating liquor during prohibited hours? The opinion of the Court is asked upon the said question of law whether or not we, upon the above statement of facts, came to a correct determination and decision in point of law, and, if not, what should be done in the premises."

L. W. Kershaw, for the appellant. The justices were wrong, and ought to have convicted the respondent. First, assuming that there was in law an appropriation of the beer on the Saturday night, there was nevertheless a sale on the Sunday. The delivery of the beer was a material part of the contract of sale, and the property in the beer did not pass on the Saturday night. The whole object of the purchaser was to obtain beer on the Sunday morning, and he bargained on the Saturday

night that he should so obtain it, while the object of s. 9 is to prevent the obtaining of intoxicating liquor during prohibited hours. The definition of "sale" given in s. 62 of the Licensing Act, 1872, is wider than the ordinary meaning of the word, and covers such a case as the present. The case of *Saunders* v. *Thorney* (1) is in point.

[LORD ALVERSTONE C.J. In that case there was no specific appropriation on the Saturday night.]

Secondly, there was no evidence on which the justices could find an appropriation in fact. Putting the beer in the bottle was no evidence of appropriation, for if the bottle had been broken the respondent would undoubtedly have supplied other beer on the Sunday, and there is nothing whatever to shew that the so-called appropriation was ever assented to by the purchaser, which distinguishes the case from *Pletts* v. *Beattie*. (2) [He also cited *Commissioner of Police* v. *Roberts* (3); *Mackenzie* v. *Spear*. (4)]

Fitch, for the respondent. The justices were right. If delivery can be considered as in any sense a term of the contract, it is a term which has nothing to do with the actual sale, but is superadded to the actual contract of sale. The contract of sale was completely carried out on the Saturday, and was in no way affected by the addition of a condition as to delivery on Sunday; the property passed on Saturday. It is apparent from the judgment of Day J. in *Pletts* v. *Beattie* (2) that the sale and the delivery are two distinct things.

[LORD ALVERSTONE C.J. The judgment of Channell J. in *Saunders* v. *Thorney* (1) seems against you.]

It is true that Channell J. said that a person kept licensed premises open within the meaning of s. 9 if he opened them for the carrying out of any material part of the transaction of sale; but in that case there had clearly been no appropriation on the Saturday, and appropriation is part of the contract of sale. There was ample evidence in the present case to justify the justices in finding that there had been an appropriation of the beer on the Saturday night.

Kershaw, in reply.

(1) (1898) 78 L. T. 627.
(2) [1896] 1 Q. B. 519.
(3) [1904] 1 K. B. 369.
(4) (1902) Unreported.

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LORD ALVERSTONE C.J. I have felt during the argument, and still feel, considerable difficulty in the present case, but upon the whole I have come to the conclusion that the appeal should be allowed. Two points have been taken on behalf of the appellant. First, it is contended that the delivery of the beer on the Sunday morning was of the essence of the contract, and that the proper conclusion to be drawn from the evidence is that the beer would not have been purchased at all unless it was to be delivered on the Sunday; secondly, that there was no sufficient evidence of the appropriation of the beer on the Saturday evening, the only evidence being that it was put in a bottle and put aside with the intention of delivering it to the purchaser next morning, and that there was no sufficient evidence of the purchaser having assented to the appropriation in the sense in which the appropriation had been assented to in *Pletts* v. *Beattie* (1) and subsequent cases, where much turned on the authority given by the purchaser to the vendor. Questions arising under s. 9 of the Licensing Act, 1874, may for some purposes be different from those arising under s. 3 of the Licensing Act, 1872, under which *Pletts* v. *Beattie* (1) was decided, though both sections deal with sales of intoxicating liquor. Counsel for the respondent relied upon the finding of the justices as a matter of fact that the property in the beer passed to the purchasers on the Saturday under the contract of sale, but I doubt whether that is really a finding of fact; in my judgment it is rather an inference of law from the facts and must be treated by us as such.

It is material to see what were the real facts as they appear in the case stated. It appears that two men went to the respondent's public-house on Saturday and asked for half a gallon of beer, and asked if it could be sent down to them on Sunday morning; the inference that I think may properly be drawn from this is that they would not have ordered the beer if they could not have had it sent to them on the Sunday. They then paid for the beer, which was drawn and put into a bottle; then, as the case states, the bottle was corked and put on the bar counter, whence it was taken to the brewhouse

(1) [1896] 1 Q. B. 519.

stable (which was within the curtilage) and remained there till the Sunday morning, when it was given to the barman behind the counter to hand to the two men when they called for it; as a matter of fact the barman seems to have taken it off the premises himself and gone with it to the place where the two men were, where he was stopped by the constable. There was in my opinion no evidence that what was done with the beer on the Saturday evening was done under the licence or by the authority of the purchaser; the evidence seems to shew that it was done by the vendor on his own responsibility, and, if the bottle of beer had been broken during the Saturday night, other beer would have had to be supplied to the men on the Sunday morning. I think therefore that there was not sufficient evidence on which it could properly be found that there was an appropriation of the beer on the Saturday night—I mean of an appropriation made by the respondent as the agent of the purchasers. The statement in the case does not of necessity mean that the beer was put aside in the way described with the consent of the purchasers, and in my opinion, when the justices speak of appropriation, they mean simply an appropriation by the publican.

That is enough for the decision of this case; but we ought not to shrink from stating our opinion upon the other, and more difficult, point that was argued before us. In my opinion, even assuming a legal appropriation of the beer on the Saturday evening, there was evidence on which the respondent ought to have been convicted of an offence under s. 9 of the Licensing Act, 1874—that is, of keeping his premises open for the sale of intoxicating liquor on the Sunday morning. This point really depends on the question whether we are to adopt the test laid down by Channell J. in *Saunders* v. *Thorney* (1), where he says: "I think that a person opens his licensed premises within the meaning of the section when he opens them for the carrying out of any material part of the transaction of sale." Personally, I adopt that view, and think that if any part of the bargain of sale involves the opening or keeping open of the premises for delivery of the goods on Sunday, the case

(1) 78 L. T. 627.

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falls within the mischief of the section. I have come to the conclusion that when Doherty was in the public-house on the Saturday evening he bargained as a condition of his buying the beer that it should be delivered from the public-house on the Sunday morning. It has been suggested that the beer might have been put outside the bar and left somewhere within the curtilage of the premises to be fetched by the purchaser in the morning; but the answer to the suggestion is that if the purchaser had got on the premises during prohibited hours on the Sunday it would have been within the mischief aimed at. We were pressed with the argument founded on *Pletts* v. *Beattie* (1), and with the difficulties that may be suggested in cases under s. 3 of the Licensing Act, 1872; but the answer to that objection is that the only question that arises under s. 3 is whether the transaction of sale took place in licensed premises; in *Pletts* v. *Beattie* (1) the traveller of the licensee had the purchaser's consent to the appropriation, and goods were at the purchaser's risk after the appropriation, and no part of the transaction took place on licensed premises. No doubt in *Mackenzie* v. *Spear* (2) the judgment proceeded on the point that there had been an ordinary bargain and sale and delivery on the licensed premises; the beer was set aside, and it was intended that the delivery should take place on the Saturday night; delivery on Sunday was no part of the transaction of bargain and sale between the parties, and the decision did not lay down the suggested principle that a bargain for delivery on Sunday prevents a case from coming under the operation of s. 9 of the Licensing Act, 1874. Upon the whole, therefore, I have come to the conclusion that upon both grounds this appeal should be allowed.

KENNEDY J. I am of the same opinion. Upon the facts stated there is shewn an arrangement on the part of the respondent to deliver from the licensed premises on Sunday beer which had been put into a bottle of the respondent on the Saturday night, and I do not feel myself in a position to say that the contract between the parties was complete irre-

(1) [1896] 1 Q. B. 519. (2) Unreported.

spective of the delivery of the beer during prohibited hours on Sunday. There was not merely an agreement to deliver the beer on Sunday, but to deliver it during prohibited hours on that day; and it appears to me that nothing could be more dangerous or more likely to destroy the manifest intention of the Legislature than to hold that a transaction was not within s. 9 of the Licensing Act, 1874, in which the purchaser's bargain is not to buy beer at the moment, but to buy it if it can be delivered to him during prohibited hours on the next day, and the beer is during those hours taken from the premises and delivered in accordance with the bargain. What was the real transaction between the parties? I am not clear as to what the justices meant by their finding that there had been a specific appropriation. In effect what happened was that the purchaser asked if he could have half a gallon of beer, to be sent down to him during prohibited hours next day, and was told that he could; he then put the price of the beer on the counter and did nothing more. In *Pletts* v. *Beattie* (1) there was an appropriation in the proper sense of that term: it was assented to by the buyers by means of a written notice, and also assented to by the vendor. Here what happened was that the respondent, after making the agreement with Doherty, put the required quantity of beer into his own bottle, corked it, put it on the bar counter, and then the bottle was subsequently taken to the brewhouse stable, which was within the curtilage of the licensed premises, and left there for the night. The next morning during prohibited hours it was taken from the premises by the barman and delivered to the purchaser according to the agreement. It is, I think, beyond doubt that if that beer had been spilt or otherwise disposed of before delivery to the purchaser the respondent could not have claimed to retain the money on the ground that the purchaser had consented to the beer in the particular bottle being set aside for him overnight and that it was at his risk; it is clear that no property passed; there was no acceptance of the beer poured into that particular bottle.

Speaking for myself, I agree with my Lord on this first point.

(1) [1896] 1 Q. B. 519.

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A finding that there had been an appropriation of the specific goods is on the facts stated without justification. There was merely a contract for the sale of a certain quantity of beer to be delivered from the premises during prohibited hours. I confess that I should go further, and, as at present advised, should be prepared to hold that, if on a Saturday night a man were to point to one in a row of bottles in the bar of a public-house and say that he wanted that particular bottle and would pay for it now but it must be delivered to-morrow during prohibited hours, the so delivering it would be carrying out an essential part of the transaction of sale and the case would be within the section, although in such a case there would be an appropriation of the chattel. It is true, as said by Wills J. in *Pletts* v. *Beattie* (1), that sale and delivery are two distinct elements in a contract for the sale of food. But nevertheless the time of delivery may be made an essential term of the contract of sale. No doubt where there has been a complete sale, the mere fact of delivery of the beer taking place during prohibited hours may under certain circumstances not be an offence, as in *Mackenzie* v. *Spear* (2), where the delivery on Sunday was the result of the accidental omission of the purchaser to fetch it on the Saturday night according to the original intention of the parties. And it may be that where there is a genuine sale of a bottle of beer on a Saturday without any reference being made to the delivery, the mere fact of his sending out the beer during prohibited hours afterwards might properly be held not to make the licensed person liable for having kept his premises open for sale during prohibited hours, though it is not necessary for me now to express an opinion on that point. But in the present case there was, in my view, no appropriation, and, further, the time of delivery constituted an essential part of the bargain, and I agree with my Lord that this appeal should be allowed.

RIDLEY J. I do not dissent from the view of my Lord and my brother Kennedy that this appeal should be allowed, because upon the true inference from the facts stated in the

(1) [1896] 1 Q. B. 519. (2) Unreported.

case I am of opinion that there was not a complete appropriation on the Saturday of the beer to the purchaser. At first I was inclined to think that there had been, and if my opinion on that point had not been changed during the course of the argument, I should have been of opinion that the decision of the justices was right; but having come to the conclusion that I have upon the facts, I think that they should have convicted the respondent. In my judgment the question of appropriation is all important, because, if the sale was complete on the Saturday, the delivery on the Sunday was immaterial.

Now, how does s. 9 of the Act of 1874 deal with the question of sale? My brother Kennedy says that, if there has been a sale on the Saturday, a term of which is that delivery of the beer is to be on the Sunday, the case ought to be held to come within that section; with all respect, I am unable to concur in that view. The question is whether the Legislature has said anything which involves this principle, and I am of opinion that they have not. Under s. 9 there must be a sale or exposure for sale, or an opening or keeping open for sale, and that being so I cannot see how it can properly be said that the beer in this case was sold on the Sunday morning. There is a third class of offence dealt with by s. 9, that of allowing intoxicating liquor purchased before the hour of closing to be consumed on the premises after that hour; the present case is clearly not within that clause, which is, however, important as shewing what the Legislature had in view when dealing with consumption after closing hours—they were dealing only with a consumption on the licensed premises. One other section I may refer to—s. 62 of the Licensing Act, 1872—which deals with the necessary proof of a sale of intoxicating liquor, and provides that it shall not be necessary to shew that any money actually passed if the Court is satisfied that "a transaction in the nature of a sale" actually took place; I do not say that that section is necessarily to be read with s. 9 of the Licensing Act, 1874, but it is dealing with a cognate subject, and I think it may be taken as affording some indication of the probable intention of the Legislature when dealing under the latter section with the offence of opening licensed premises for sale of

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intoxicating liquors during prohibited hours. If the question is asked me whether in the present case there was a transaction in the nature of a sale on the Sunday morning, I should unhesitatingly say that there was not. For these reasons I think that, so far as this point is concerned, the present case does not come within the statute, for, on the assumption that there had been an appropriation of the beer on the Saturday, the transaction of sale was then at an end, and the delivery of the beer formed no part of it; the case would then, I think, be within the decision in *Pletts* v. *Beattie*. (1) But, as I have already said, I concur in the view that there was no appropriation of the specific goods, and for that reason I agree that our judgment should be for the appellant.

Appeal allowed.

Solicitors for appellant: *Snow, Fox & Higginson, for Harcourt E. Clare, Preston.*

Solicitors for respondent: *R. H. Bentley, for T. R. Bertwistle, Bury.*

(1) [1896] 1 Q. B. 519.

W. J. B.

[IN THE COURT OF APPEAL.]

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WICKS *v.* DOWELL & CO., LIMITED.

Employer and Workman—Workmen's Compensation—Accident arising out of Employment — Epileptic Fit — Fall into Hold of Ship — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

A workman employed in unloading coal from a ship, who was required in the course of his duty to stand by the open hatchway through which the coal was being brought up from the hold, was seized with an epileptic fit while at work, and fell into the hold and was seriously injured:—

Held, that regard must be had to the proximate cause of the accident resulting in the injury, which was to be found in the necessary proximity of the workman to the hatchway; that the accident therefore arose "out of" as well as "in the course of" his employment, and that he was entitled to compensation under the Workmen's Compensation Act, 1897.

APPEAL against the refusal of the judge of the Greenwich County Court to award compensation to an applicant under the Workmen's Compensation Act, 1897.

The applicant was employed by the respondents in unloading coal by means of a hydraulic crane from a ship lying at their wharf. His duty was to stand on a wooden stage close to the edge of a hatchway, the stage being so constructed as to enable him to look down into the hold, and while standing on the stage he had to regulate the descent of the bucket into, and its ascent out of, the hold by means of a long pole, and also to give the necessary signals to the man who was working the crane. While thus engaged he was seized with an epileptic fit and fell through the hatchway into the hold, and sustained very serious injuries. He had had an epileptic fit on three previous occasions. The county court judge held that the accident was due to the epileptic fit and did not arise out of and in the course of the employment within the meaning of s. 1 of the Workmen's Compensation Act, 1897, and refused to make an award of compensation. The applicant appealed.

Overend and *John Duncan*, for the applicant. The injuries to the applicant were caused by an accident arising out of and

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in the course of his employment. His fall into the hold of the ship was none the less an accident because it was occasioned by an epileptic fit; and, it being an incident of his employment that he should have to stand by an open hatchway, and therefore incur the risk of falling into it, the accident may properly be said to have arisen out of and in the course of his employment. In *Winspear* v. *Accident Insurance Co.* (1) it was held that, where a person was insured against death resulting from "any personal injury caused by accidental, external, and visible means," and he was seized with an epileptic fit while crossing a stream, and in consequence fell into the stream and was drowned, the case was covered by the policy. In *Lawrence* v. *Accidental Insurance Co.* (2) there was an insurance against death from "injuries accidentally occurring from material and external causes operating upon the person of the insured," and the case of death arising from fits was expressly excluded by the policy. The assured was seized with a fit whilst at a railway station, and, falling on to the line, was run over by a train and killed. It was held that the death of the assured was caused by an accident within the meaning of the policy. To the same effect is *Reynolds* v. *Accidental Insurance Co.* (3) The meaning of the term "accident" as used in the Workmen's Compensation Act, 1897, is apparently wider than in a policy against accidents, such as formed the subject of decision in those cases: see *Fenton* v. *Thorley & Co.* (4); *Turvey* v. *Brintons, Ld.* (5), in House of Lords.

Ruegg, K.C., and *Shakespeare*, for the defendants. The cases cited with regard to accident policies are not really in point. The question in those cases was whether the death arose from an "accident," and turned on the wording of the particular policy. The question here is whether the workman's injuries were caused by an "accident arising out of his employment." It is contended that the applicant's fall did not arise out of his employment. The true efficient cause of

(1) (1880) 6 Q. B. D. 42.
(2) (1881) 7 Q. B. D. 216.
(3) (1870) 22 L. T. (N.S.) 820.
(4) [1903] A. C. 443.
(5) [1904] 1 K. B. 328; [1905] A. C. 230.

his fall was the epileptic fit, which did not arise out of, and had nothing to do with, his employment. If the true cause of the accident is idiopathic disease, it cannot be said to arise "out of" the employment. Doubtless the consequences of the fall were rendered more serious by the fact that the applicant, in the course of his employment, happened to be standing by an open hatchway and therefore fell a greater distance; but the principle must be the same as if he had fallen on the adjoining quay, in which case it could not possibly be said that the accident arose out of the employment. All that arises out of the employment is that the consequences of the fall are more serious, but the fall itself does not arise out of it. In *Fenton* v. *Thorley & Co.* (1) and *Turvey* v. *Brintons, Ld.* (2), the House of Lords was dealing with the question of what constituted an accident, and not with the question of when an accident could be said to arise out of the employment. It is the causa causans which must be looked to, and it is wrong to dissociate the fit from its consequence and say that, though the one was not an accident, the other was.

Overend was not called upon to reply.

COLLINS M.R. In this case the learned county court judge came to the conclusion, rather as a matter of law than as an inference of fact, that the injury to the applicant did not arise out of and in the course of his employment within the meaning of s. 1, sub-s. 1, of the Act of 1897. From the evidence it appears that the applicant was engaged at work close to the hatchway of a ship from which coal was being discharged, and that his duty was to guide the bucket into and out of the hold and to watch it as it was being raised and lowered; he was subject to epileptic fits and was seized with one while standing by the open hatchway, with the result that he fell down into the hold and was severely injured. The question we have to decide is whether the injury which he received was an injury arising out of and in the course of his employment within the meaning of the statute. The county court judge held that it was not. On this appeal the argument has been presented to

(1) [1903] A. C. 443. (2) [1905] A. C. 230.

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us that, as the original cause of the applicant's fall was the fit with which he was seized, the cause was one which the man himself carried about with him, and that the damage which he sustained did not arise out of and in the course of his employment, but arose out of the idiopathic condition of the workman at the time.

I am of opinion that we are precluded by authority from giving effect to this argument. A number of decisions have been cited to us, which have never been questioned and have always been followed in this Court—decisions in cases where actions have been brought upon policies of insurance against accidents. Those policies are always very carefully worded from the point of view of the insurer with the view of limiting his liability to that which is in the strict sense of the word an accident and of eliminating from the risks insured anything that is due to the idiopathic condition of the person insured. I need only refer to two of those many decisions, in which it was held that where a person who while in proximity—in one case to a stream of water, in the other to an engine on a railway—was seized with a fit, with the result that the one man fell into the water and was drowned and the other fell on the line and was run over, the death arose from accident, notwithstanding the very special words inserted in the policy with the view of protecting the insurers; in other words, the Court looked at the causa proxima of the death, which was obviously the drowning or the being run over by the engine. The Court there interpreted the word "accident" from the point of view that the seizure took the man at a place where the fatal consequences resulted.

It is said that these decisions on the meaning of the word "accident" in insurance policies have no application to the word as used in the Workmen's Compensation Act, and reliance is placed on some observations made in the case of *Fenton* v. *Thorley & Co.* (1) in the House of Lords. But when those observations are carefully looked at, I think that they do not affect the authority of the insurance cases on the question before us. The point that was there being insisted on was

(1) [1903] A. C. 443.

that the remedies under this Act were not to be limited by special contracts of insurance, and it was not suggested that what would have been an accident but for such limitations was not an accident under the Workmen's Compensation Act; in other words, compensation for an accident might be recoverable under that Act although an action might not lie under the same circumstances upon an accident insurance policy. If injury is caused by an accident under the narrow standard of construction applied to insurance policies, a fortiori it is so caused within the meaning of the Workmen's Compensation Act.

But those authorities are in my judgment directly in point. A man is picked up at the bottom of the hold of a ship suffering from injuries: what is the cause of his condition? The proximate cause obviously is that he has fallen from a height. But it is suggested that if the occurrence is analyzed, it will be seen that the accident was caused by the idiopathic disease from which the man was suffering, and that therefore the accident did not arise out of his employment. At that point the authorities come in, to the effect that, although the cause of the fall was a fit, the cause of the injuries was the fall itself, and they are direct authorities that the injury in the present case was caused by an accident.

Then did the accident arise out of the man's employment? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit and the confusion involved in not dissociating the injury and its actual physical cause from the more remote cause, that is to say, from the fit, the difficulty arising from the words "out of the employment" is removed. How does it come about in the present case that the accident arose out of the employment? Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If that is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position. Upon the authorities I think the case is clear: an accident does not

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cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment. I think, therefore, that the present case comes within the purview of the Workmen's Compensation Act, and that there is nothing in either the decision or the dicta of the learned Lords in *Fenton* v. *Thorley & Co.* (1) which in any way qualifies the view that I have endeavoured to express. The appeal must be allowed.

MATHEW L.J. I am of the same opinion. The case affords an illustration of the rule that one should look to the immediate, and not to the remote, cause. In this case the immediate cause of the injury was the fall: I see no reason why we should hold that there was not an accident within the meaning of this statute. The true mode of dealing with the case is shewn by a reference to the insurance cases that were cited during the argument. In *Fenton* v. *Thorley & Co.* (2) Lord Macnaghten said: "One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as 'accidents' which beyond all others merit favourable consideration in the interest of workmen and employers alike." If we apply that view to the particular case, and treat the claim as an action brought upon a policy of insurance against accidents arising out of the employment of the assured, there can be no question that such a policy would cover the case. In my opinion we ought not to go back along the train of circumstances and trace the accident to some remote source when it is plain that the man was in fact injured by falling from the place where he was standing, and where it was his duty to stand, in discharge of his duty to his employer.

(1) [1903] A. C. 443.

(2) [1903] A. C. 443, at p. 446.

COZENS-HARDY L.J. I agree, and have little to add. It seems plain to me on the authorities that what happened here was an "accident." It is also plain, and indeed is not contested, that the accident happened in the course of the employment; the only difficulty is whether it arose "out of" the employment; on the whole I am of opinion that it did. If I could adopt the view that has been pressed upon us, that the employer is not liable for the remote consequences of a disability which the workman brings with him to his work, I should come to a different conclusion; but I think the truer view is that a man always brings some disability with him: it may be a disability arising from age; it may be of some other nature. A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability which he brings with him than he would otherwise be. Again, an old man is inherently more likely to meet with an accident than a young one, but an employer could not excuse himself on the ground of the man's age. The same consideration applies to a tendency to illness or to a fit, and if a man with such a tendency is told to go to work in a dangerous position and there meets with an accident, the accident none the less arises out of his employment because its remote cause is to be found in his own physical condition.

Appeal allowed.

Solicitor for applicant: *Roland H. Ward.*
Solicitors for respondents: *William Hurd & Son.*

W. J. B.

C. A.
1905
May 10.

[IN THE COURT OF APPEAL.]

STEEL *v.* CAMMELL, LAIRD & CO., LIMITED.

Employer and Workman—Compensation—Accident—Disease communicated by Material worked on—Lead-poisoning—Gradual Accumulation of Lead in System—Ultimate Injury—Notice of Accident—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 2.

A workman, whose employment necessitated the handling of white and red lead, gradually accumulated lead in his system, with the ultimate result that he suffered from lead-poisoning, which produced partial paralysis and incapacity for work. On appeal from an award of compensation under the Workmen's Compensation Act, 1897:—

Held, that to bring a case within the Act there must be, by reason of s. 2, sub-s. 1, an injury by an accident of which notice can be given, and that, since it was not possible to indicate a time at which there was an accident which caused the injury to the workman, he was not entitled to an award under the Act.

APPEAL from the decision of the judge of the county court of Birkenhead on an application for an award of compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the service of the employers who were shipbuilders. His work was that of a caulker, and in the course of it he had to use white and red lead, which were smeared by him upon rope-yarn and worked in with the hands. Gradually, and as a result of his working with those materials, his system became saturated with lead, either by absorption through the pores of the skin, by inhalation, while using the red lead which was a powder, or by transference to the intestines while he was eating his meals. Upon December 19, 1904, he was seized with cramp in his hands, which was the commencement of partial paralysis by reason of which he became totally incapacitated for work. The paralysis arose from lead-poisoning, which might have come about, according to the medical evidence, in either of the three ways above indicated. The effect of the medical evidence was that the poisoning was a result that might have been expected from the nature of the applicant's work; that only a small number

of such cases occurred among the large number of persons working with white and red lead; that the development of lead-poisoning was gradual and the poisoning could not be traced to any particular day, but was the result of a number of small doses; that the lead accumulated in that way in the applicant's system; and that the seizure with cramp on December 19, 1904, and the subsequent paralysis were the outcome of those accumulated doses.

The county court judge found that personal injury by accident arising out of and in the course of his employment had been caused to the workman, and made an award in his favour.

The employers appealed.

C. A. Russell, K.C., and *Keogh*, in support of the appeal. The county court judge appears to have based his decision in favour of the applicant upon the view that there was an "accident" on December 19. This was erroneous, for the accident contemplated by the Act cannot be the mere outcome of a long-continued process acting injuriously on the system of the workman. By s. 2, sub-s. 1, notice of the accident has to be given as soon as practicable after the happening thereof; the claim is to be made within six months from the occurrence of the accident; and by sub-s. 2 the notice in respect of an injury is to state the date at which it was sustained. The decision of the House of Lords in *Fenton* v. *Thorley & Co.* (1) does not apply to such a case as the present one. There was an overstraining on a particular occasion which was held to be an injury by accident, but it does not follow that a breakdown of a workman arising from his slightly overstraining himself from day to day must be described as an accident. The two cases are quite different, though the ultimate result may be the same. In *Turvey* v. *Brintons, Ld.* (2), there was present in the wool which the workman was sorting a foreign body, the bacillus of anthrax, which caused an accident just as any other foreign body, for instance a piece of glass, might. During the time

(1) [1903] A. C. 443.
(2) [1904] 1 K. B. 328; affirmed in the House of Lords, [1905] A. C. 230.

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in which the lead was accumulating in the applicant's system he was in the employment of one firm, but he might have been in the employment of several firms during the time, and the Act points to an injury wholly incurred while in the employment of the person who is liable to compensate the workman.

Tobin, *K.C.*, and *Greaves Lord*, for the applicant. On the decisions as they stood before *Fenton* v. *Thorley & Co.* (1) it may be conceded that the applicant would have had no case, but his position must be determined in view of that decision. It is clear that he has suffered a mischance, and that it arose out of and in the course of his employment; but the question is whether that was the result of an accident. It is submitted that all three methods by which lead could have got into his system were accidental, the accumulation of the lead being due to a succession of accidents, the date of the last of which, though not capable of being accurately fixed, can be so approximately as December 19, 1904. Whether the lead got into his system by absorption, by inhalation, or by swallowing, each particle of it was a foreign substance getting into his system accidentally, just as in the anthrax case the bacillus got into the system of the workman in that case. Taking the head-note in *Fenton* v. *Thorley & Co.* (1), it is clear that the injury to the applicant in this case was what is there described as "a mishap or untoward event not expected or designed." The accident alleged need not contain the element of a chance occurrence implied by the word "haphazard." The decision of the House of Lords upholds that of the Court of Session in *Stewart* v. *Wilsons and Clyde Coal Co.* (2), in which Lord M'Laren considered that if a workman, in the reasonable performance of his duties, sustains a physiological injury as the result of the work he is engaged in, that is accidental injury in the sense of the statute. That view is applicable to the present case, for it would be a strange result that if a particle of lead got into a man's eye and caused blindness it would be beyond controversy that there was a case of injury by accident, yet

(1) [1903] A. C. 443. (2) (1902) 5 F. 120.

when a number of particles of lead get into a man's system and cause poisoning and consequent paralysis there is no injury by accident. It is submitted, therefore, that the finding of the county court judge was correct.

COLLINS M.R. This is an appeal from the decision of the judge of the county court of Birkenhead, who held that paralysis resulting to a workman, whose daily task involved handling white and red lead, and admitted to have been induced by the nature of his work, was an injury by accident within the meaning of the Workmen's Compensation Act, 1897.

A number of cases were decided in this Court as to the meaning to be attached to the word "accident," and attempts were made to lay down a rule applicable to this Act based upon a dictum of Lord Halsbury in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1) It is true that the Lord Chancellor was dealing with another subject-matter, which was the meaning of the words "peril of the seas" in a charterparty. He gave his view upon this question as follows: "I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident.'" From that point of view it was comparatively easy to decide whether that element was present in any particular case under the Workmen's Compensation Act, and an accident was treated as something fortuitous, and it was pointed out that in determining whether a case came within the Act a cardinal factor was whether it arose from some external and unexpected cause or from some inherent defect. The Courts separated the fact of an inherent predisposition from the fortuitous happening of something which produced the ultimate result. That gave a working principle; but we are now told that we must not apply that principle to cases under the Workmen's Compensation Act. In *Fenton* v. *Thorley & Co.* (2) Lord Macnaghten, in making observations on the meaning of the word "accident" in this Act, said, in reference to the implication in that expression of something "fortuitous": "To the expression as used by Lord Halsbury in the passage in which it occurs no possible

(1) (1887) 12 App. Cas. 518. (2) [1903] A. C. 443.

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objection can be taken; but it is, I think, to be regretted that the word 'fortuitous' should have been applied to the term 'injury by accident' in the Workmen's Compensation Act. If it means the same thing as 'accidental,' the use of the word is superfluous. If it introduces the element of haphazard (if I may use the expression), an element which is not necessarily involved in the word 'accidental,' its use, I venture to think, is misleading, and not warranted by anything in the Act." Therefore we must now approach the attempt to define the meaning of the word "accident" leaving out the element of haphazard. This it is not easy to do, and the process is not facilitated by a further expression as to the meaning of the word accident, which occurs later on in the judgment of Lord Macnaghten, in which he said: "I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." It appears that an accident must be a mishap from which the element of haphazard is to be eliminated, and the word at the same time is to be treated as being used in its popular and ordinary sense. I find it difficult to extract guidance from that case, and as a result I am put in the position of the "man in the street" for the purpose of deciding whether the facts in any particular case disclose an accident. In that position, and without attempting to give reasons, I have to see if the occurrence in this case can be called an accident. Turning to the facts of the case I find that the injury to the applicant was lead-poisoning, which was brought about through the applicant being saturated with lead in consequence of his being in continuous contact with it. According to the medical evidence this might have come about by inhalation, or by the lead getting into his system with his food, or by absorption through the skin. In any case the result must have come about through long exposure to contact with the lead, and gradually not suddenly. It is not possible to indicate any precise time at which the mischief arose. It seems to me that the provisions of s. 2 of the Act shew that what is dealt with are cases in which a date can be fixed as

that on which the injury by accident came about. I am unable to find such a date in this case. It has been suggested that there were a series of accidents by the continuous absorption of lead, by one or other of the three processes named; but this suggestion does not meet the difficulty which arises from the provisions of the Act as to notice of the particular date of the accident or the injury.

I have come, for these reasons, to the conclusion that the injury sustained by the applicant cannot be described as an "injury by accident" so as to bring the case within the Act, and that the appeal should be allowed.

MATHEW L.J. I am of the same opinion. The House of Lords in cases relating to the word "accident" have interpreted it by a number of phrases, intended to convey that which is involved in the word, something unexpected or unlooked for or fortuitous or unforeseen. At the same time, in relation to the word as it occurs in this Act, we are told that its use in popular language must be borne in mind, and the cardinal question will be whether according to the ordinary use of language this particular injury can be said to be accidental. The evidence on this point seems to me to be clear. The man was following a dangerous occupation because it might involve the risk of lead-poisoning. But the evidence shews that in the majority of cases the workman would not be affected, though there is a minority in which the injury is sure to arise, and when the lot fell on a particular individual, it could not be said that the case was unexpected or fortuitous or unforeseen. It was certain that somebody would suffer, and this man turned out to be susceptible to the poison. It appears to me that the occurrence was not an accident, and that the learned judge did not draw the correct inference from the evidence before him. His judgment therefore must be reversed, and the appeal allowed.

COZENS-HARDY L.J. I am of the same opinion. The doctor called as a witness by the workman said that the paralysis was an "occupation" disease, which he should expect in a certain

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number of cases to follow on the work on which the workman was engaged. It was not unforeseen; it was not unexpected. Whatever may be the correct definition of "accident," if it be possible to give one, one thing is clear, that, in this Act of Parliament at least, it is something of which notice can and must be given. The statute negatives the idea that it applies to a case like the present one, where the only suggestion is that the injury was due to some or all of a succession of accidents. It is not enough to say that the injury arises out of and in the course of the employment. Injury by disease alone, not accompanied by an accident, is expressly excluded, as pointed out by Lord Macnaghten in *Fenton* v. *Thorley & Co.* (1) It must be made out not merely that there is injury arising out of and in the course of the employment, but injury by accident arising out of and in the course of the employment; and that is a thing that I am unable to find here. Reliance was placed upon the decision in the anthrax case, *Turvey* v. *Brintons, Ld.* (2); but when that is carefully looked at, it seems to me really not to help the applicant in this case. There the impact of the bacillus upon the particular spot where the disease developed was proved as a fact. The source of the bacillus was known, the place at which it struck the subject was known, and the accident was known. That seems to me to have no relation to a case like the present. With all respect for the county court judge, I think there was no evidence upon which he could properly come to the conclusion at which he arrived.

Appeal allowed.

Solicitors for applicant: *Helder, Roberts & Co., for J. A. Behn, Liverpool.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Stone, Fletcher, Hull & Stone, Liverpool.*

(1) [1903] A. C. 443.

(2) [1904] 1 K. B. 328.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1905
May 23.

IMPERIAL AND GRAND HOTELS COMPANY, LIMITED *v.* CHRISTCHURCH GUARDIANS.

Poor-rate—Appeal—Notice of Objection to Assessment Committee—Time—Next practicable Sessions—Poor Relief Act, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Amendment Act*, 1864 (27 *& 28 Vict. c.* 39), *s.* 1.

On an appeal against a poor-rate made on April 21, 1903, for the ensuing year, it appeared that the appellants had not given notice of objection to the valuation list upon which the rate was based till October 26, 1903. There had been meetings of the assessment committee on May 15 and August 13, and Courts of quarter sessions were held on June 27 and October 27. The appellants, having failed to obtain relief at the meeting of the assessment committee held on November 12, appealed against the rate to the quarter sessions held on January 2, 1904:—

Held, that, the notice of objection to the valuation list having been given during the currency of the rate, and, it not having been proved that the appellants had been guilty of unreasonable delay, the appeal must be considered as having been brought to the next practicable quarter sessions within the meaning of the Poor Relief Act, 1743, s. 4, and therefore was not too late.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Kennedy J., and Ridley J.) upon a case stated by the Recorder of Bournemouth in an appeal to quarter sessions against a poor-rate.

The facts are fully stated in the report of the case in the Divisional Court (1), and for the purposes of this report may be more briefly stated as follows:—

The rate appealed against was made upon April 21, 1903, by the overseers of the parish of Bournemouth in the Christchurch Union to provide for expenses to be incurred before March 31, 1904, payable by two equal instalments, the first payable on May 1, 1903, and the second on November 1, 1903. The assessment committee of the respondents' (2) union held meetings for the purpose of hearing objections to the valuation list,

(1) [1905] 1 K. B. 89.

(2) The terms "appellants" and "respondents" are used throughout with reference to the position of the parties at sessions.

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of which due notice was given, upon May 15, August 13, and November 12, 1903. Courts of quarter sessions were held upon June 27 and October 27, 1903.

The appellants first gave notice of objection to the valuation list on which the rate appealed against was based on October 26, 1903. The said objection was heard by the assessment committee at their meeting held on November 12, 1903; and the appellants failed to obtain thereat such relief in the matter as they thought just. The appellants on December 5, 1903, gave due notice of appeal to the quarter sessions to be holden on January 2, 1904. The appellants had paid the first instalment of the rate which became payable on May 1, 1903, in the month of August, 1903, before they gave notice of objection to the valuation list. The respondents contended that the quarter sessions had no jurisdiction to entertain the appeal, inasmuch as the appellants had not appealed to the next quarter sessions for the borough as required by s. 4 of the Poor Relief Act, 1743.

The recorder overruled the objection, being of opinion that in the circumstances above stated the appeal was made to the next quarter sessions for the borough within the meaning of the Poor Relief Act, 1743, s. 4, and the Union Assessment Committee Amendment Act, 1864, s. 1.

Having heard the appeal on the merits, the recorder reduced the assessments made upon the appellants' property, but, inasmuch as the appellants had not taken steps, as they might have done, to appeal against the rate at an earlier date, he ordered that the alteration of the assessment should only operate in respect of the second instalment of the rate, and refused to order that the excess paid by the appellants in respect of the first instalment should be refunded to them or allowed off the second instalment. The case stated raised two questions for the Divisional Court—(1.) whether the recorder was right in holding that the appeal was not out of time; (2.) whether, if so, he was right in ordering that the alteration in the rate should only apply to the second instalment. It was ultimately admitted by the counsel for the respondents in the Divisional Court that, if the recorder was right in his decision

on the first question, his decision on the second question could not be supported.

The Divisional Court held that the decision of the recorder on the first question was right, and that he had jurisdiction to entertain the appeal.

The respondents appealed.

Ryde (*Francke* with him), for the respondents. The Poor Relief Act, 1743, s. 4, provides that a person aggrieved by a poor-rate may, on giving reasonable notice of his intention to do so to the overseers, appeal against the rate to the "next" general or quarter sessions. It has been held under that enactment in many cases that "next quarter sessions" must be construed as meaning "next practicable quarter sessions"; because, having regard to the condition that a reasonable notice of appeal must be given to the overseers, it might be impossible to appeal to the very next sessions after the publication of the rate. The Union Assessment Committee Act, 1862, provides for the making of a valuation list in accordance with which the rate must be made, and s. 18 empowers a person aggrieved by a valuation contained in the list to take objection to the list within twenty-eight days after notice of the deposit thereof by the overseers in pursuance of s. 17 of the Act. It was under that Act competent for a person aggrieved by a rate to appeal against it on the ground of the incorrectness of the valuation, although he had made no objection to the list on which it was based. By the Union Assessment Committee Amendment Act, 1864, s. 1, it is made a condition precedent to the right of appealing against the rate that the person aggrieved should have given to the assessment committee notice of objection to the valuation list, and failed to obtain relief in the matter from them. It is not disputed that, since that Act, in considering what is the next practicable sessions under the Poor Relief Act, 1743, regard must be had to the necessity now imposed on an appellant of applying for relief to the assessment committee; but the 4th section of the Poor Relief Act, 1743, is not repealed as regards poor-rates, and the appeal must still be to the next practicable sessions,

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although the question which is the next practicable sessions may be affected by the later Act. Here, there having been two meetings of the assessment committee and one quarter sessions before the appellants gave notice of objection, and the appeal not being brought till the third quarter sessions after the publication of the rate, it is impossible to say that the appeal was to the next practicable quarter sessions. The Union Assessment Committee Amendment Act, 1864, no doubt, says in terms that the notice of objection to the list may be given under it "at any time"; but it is submitted that those words must clearly be read with some qualification. It would be impossible to contend that, years after a rate has been published, a person aggrieved thereby may give notice of objection to the list, and then, on failing to obtain relief from the assessment committee, appeal against the rate to the next sessions. The words "at any time" were, it would appear, inserted in the section for the purpose of providing that the notice of objection contemplated by s. 1 of the Union Assessment Committee Amendment Act, 1864, should not be subject to the limitation of twenty-eight days from notice of deposit of the list mentioned in s. 18 of the Union Assessment Act, 1862. The party aggrieved by the rate might not have had an opportunity of objecting to the list within the time mentioned in s. 18 of the Act of 1862. He might not have been in occupation of the rated hereditament when the list was deposited. It would have been a great hardship in such a case to prevent an appeal against the rate unless there had been an objection to the list under s. 18. It was not intended by that provision of the Act of 1864 to do away with the obligation to appeal to the next practicable sessions under s. 4 of the Poor Relief Act, 1743. An appellant cannot by his own want of diligence render a sessions impracticable which would otherwise have been practicable: *Reg.* v. *Sevenoaks.* (1) It was not disputed by the appellants that the words "at any time" must receive some qualification. It was suggested that it would be sufficient if the notice of objection to the list was given during the currency of the rate appealed

(1) (1845) 7 Q. B. 136; 68 R. R. 423.

against; and it would seem that this was the view taken by the Divisional Court. This limit of time appears to have been suggested by the provision as to alteration of the current rate at the end of s. 1 of the Act of 1864. But it may be pointed out that the effect of this view would be to produce a great anomaly; for then the period during which the appeal against the rate might be brought would vary with the period for which the rate might happen to be made. The rate in this case was made for a year, but the common practice is to make rates for half a year. If in this case, instead of one rate being made for the year payable in two instalments, there had been two rates for half a year each, according to the test suggested, an appeal against the first rate would have been out of time. It is submitted that the words "at any time" must be construed as at any rate subject to the limitation that the notice of objection to the list must be given within a reasonable time after the making of the rate. The recorder has not really found that the notice of objection was given in this case within a reasonable time. He acted on the view that, the appeal having been to the next quarter sessions after the assessment committee had dealt with the matter, it necessarily followed as a matter of law that the appeal was in time. Primâ facie the notice of objection was not given in reasonable time, and it was for the appellants to prove any special circumstances by way of justifying their delay. No reason whatever was shewn for not giving the notice of objection for six months and till after two meetings of the assessment committee and one quarter sessions had intervened. It has been held in *Liverpool Gas Co.* v. *Everton* (1) that a very slight delay after the assessment committee has refused relief will render the appeal too late. It would be very anomalous in the face of that decision, if a party aggrieved might delay six months in giving the notice of objection to the assessment committee, and thereby protract the period for appealing against the rate to the same extent.

[They also cited *Reg.* v. *Great Western Ry. Co.* (2); *Reg.* v. *Biggleswade Union* (3); *Reg.* v. *Wiltshire Justices.* (4)]

(1) (1871) L. R. 6 C. P. 414.
(2) (1874) 38 J. P. 822.
(3) (1869) 21 L. T. 494.
(4) (1879) 4 Q. B. D. 326.

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Clavell Salter, K.C., and *Haydon*, for the appellants, were not called upon to argue.

COLLINS M.R. This is an appeal from the judgment of a Divisional Court affirming a decision of the Recorder of Bournemouth. The question is whether appellants against a poor-rate have brought their appeal in time. That question turns on the provisions of certain statutes to which reference has been made during the argument. The first of these statutes is the Poor Relief Act, 1743, s. 4 of which provides that in case any person or persons shall find himself or themselves aggrieved by any rate or assessment made for the relief of the poor, "it shall and may be lawful for such person or persons . . . . giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise where such parish, township or place lies." The provision of the section being that the appeal shall be to the "next general or quarter sessions," subject to the condition that reasonable notice of it shall be given to the churchwardens or overseers, the words "next general or quarter sessions" in that section have necessarily, as it seems to me, been construed as meaning "next practicable general or quarter sessions." That was how the law stood before the Union Assessment Committee Act, 1862. That Act provided for the making of a valuation list, and by s. 18 enabled any person who might feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, to take objection to the list before the assessment committee. Under that Act it was optional with the person aggrieved whether he would take that course or not. Then came the Union Assessment Committee Amendment Act, 1864, upon the provisions of which the question in this case mainly depends. Sect. 1 of that Act provides that, "Before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Committee

Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: provided that, after the first day of August next, no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and, if they amend the same, shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly." Therefore the result of the legislation is as follows. The Poor Relief Act, 1743, s. 4, provides that the appeal shall be to the next quarter sessions; but, having regard to the fact that the section requires a reasonable notice of appeal to be given, which may render it impossible to go to the sessions next after the publication of the rate, its terms must, according to the authorities, be read with the necessary qualification—that is to say, as meaning the next practicable quarter sessions. Then upon the terms of that enactment, which have to be construed as subject to the qualification which I have mentioned, there are superimposed by s. 1 of the Act of 1864 two fresh conditions; namely, first, that, before appealing to the quarter sessions against the rate, the person aggrieved thereby must have given notice of objection to the valuation list to the assessment committee, which notice may by the terms of the section be given "at any time," and have failed to obtain relief from them; and, secondly, whereas under the Poor Relief Act, 1743, only reasonable notice of appeal to the churchwardens or overseers was required, now there must also be twenty-one days' notice of the intention to appeal to the assessment committee. There are, therefore,

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now these two additional conditions precedent which must be fulfilled, before the right or the obligation to appeal to the quarter sessions under s. 4 of the Poor Relief Act, 1743, arises. That being so, I think the provisions of that section must now be read with reference to those conditions, and it cannot therefore be determined whether an appeal has been brought to the next practicable quarter sessions without seeing whether they have been performed or not. That depends upon the terms of the Act imposing those conditions. Inasmuch as the Act of 1864, which imposes upon the party aggrieved by the rate the obligation of going before the assessment committee, provides that he may give notice of his objection to the list "at any time," the appellants undoubtedly come within the latitude given by the actual words of the Act. It is, however, argued that some limitation must be imposed upon the generality of the words, "at any time." I am disposed to think that is so. But I doubt whether it is possible to lay down any absolute rule as to what that limitation may be; and it does not appear to me to be necessary to endeavour to do so for the purposes of the present case; for, whatever may be the exact limit of the time within which the notice of objection must be given, there does not seem to me to be in this case any ground for saying that it has been exceeded. The notice of objection to the assessment committee was given while the rate objected to was current; and, having regard to the latitude given by the terms of the section which imposes the obligation of making that objection, I do not think that the appellants can be said to have been in any default in respect of the time at which they gave the notice of objection. From that time forward it cannot be suggested that they were in any default, for they appealed to the next quarter sessions after they failed to obtain relief from the assessment committee. On these grounds I think that the decision of the recorder and the Divisional Court was correct; and therefore this appeal should be dismissed.

MATHEW L.J. I am of the same opinion. It is a condition precedent to the jurisdiction of the quarter sessions to entertain

an appeal against a poor-rate that there should have been a decision of the assessment committee upon an objection by the party aggrieved to the valuation list upon which the rate was based; and, when we look at the terms in which the power to invoke that decision is given to the party aggrieved, we find that the notice of objection may be given "at any time." It is not until the assessment committee has dealt with that objection that the party aggrieved is in a position to appeal to the sessions against the rate. The argument of the respondents counsel appeared really to point to the conclusion that the assessment committee ought not to have heard the objection on account of the delay on the part of the appellants in giving the notice of objection. But that contention involves a complete departure from the terms of the Act, which says that the notice of objection may be given "at any time." It was urged that the words "at any time" in s. 1 of the Act of 1864 must receive a reasonable construction. I agree; and, when occasion arises, it may be thought proper to hold the correct construction of them to be that the notice of objection must be given within a reasonable time. I do not, however, think it is necessary to discuss that question on the present occasion. In this case the matter simply stands thus. The appellants in giving the notice of objection have complied with the actual words of the Act of 1864, and there seems to be no reason under the circumstances for suggesting that that compliance is not sufficient. There being no evidence here that there was unreasonable delay in giving the notice of objection, I see no reason why the appellants should not have the full benefit of the language of the Act.

COZENS-HARDY L.J. I agree. I think Mr. Ryde's argument would have been entitled to most careful consideration, if it had been addressed to a body having legislative powers. He appears to me, in substance, to ask us to insert in s. 1 of the Union Assessment Committee Amendment Act, 1864, words to the effect that the person aggrieved by a rate shall not be entitled to appeal to quarter sessions against it, unless he shall have given to the assessment committee notice of

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objection to the valuation list for their next practicable meeting. I see no sufficient ground for inserting any such qualification into the language of the Act. It seems to me that, upon the express terms of the section, the assessment committee clearly had power, if they thought it right, to allow the objection, notice of which had been given during the currency of the rate. If they had power to deal with that objection, it seems to me to be an easy, and almost inevitable, step to the conclusion that the appeal to the sessions against the rate was not out of time. I do not think it is necessary, and I do not desire, to express any opinion as to what the result might be in the extreme cases of delay put by the respondents' counsel. In the present case I can see no reason for differing from the Court below, and it appears to me that the recorder had complete jurisdiction to entertain the appeal.

Appeal dismissed.

Solicitor for appellants: *C. F. Ingram, for C. Lacey, Bournemouth.*

Solicitors for respondents: *Lovell, Son & Pitfield, for Druitt & Druitt, Christchurch.*

E. L.

KENSIT, APPELLANT; THE DEAN AND CHAPTER OF ST. PAUL'S AND OTHERS, RESPONDENTS.

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April 3, 12.

Ecclesiastical Law—Service of the Rite of Ordination of Priests—"Impediment or Notable Crime"—Objections to Candidate for Ordination—Allegation of Ritualistic Practices.

At the celebration of a service of the rite of ordination of priests, the appellant, a layman, came forth and objected that one of the deacons presenting himself for ordination had taken part in the services in a church in which adoration of the elements and other breaches of the prescribed ritual had taken place:—

Held, that the matters alleged against the deacon did not, if true, constitute an impediment or notable crime within the meaning of the words in the Ordination Service, to be said by the bishop, which call upon any person present, who knows any "impediment or notable crime" in any of the persons presenting themselves for ordination, to come forth and shew what "the crime or impediment" is.

CASE stated by the Court of quarter sessions for the City of London.

At petty sessions held at the Mansion House an information was preferred by the Dean and Chapter of St. Paul's against the appellant, J. A. Kensit, for an offence under s. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32) (1)—namely, for unlawfully disturbing the Lord Bishop of London whilst celebrating the service of the rite of ordination in St. Paul's Cathedral on February 28, 1904.

The justices convicted the appellant, imposing a fine upon him, and he appealed to quarter sessions against that conviction.

(1) 23 & 24 Vict. c. 32, s. 2: "Any person who shall be guilty of riotous, violent, or indecent behaviour, ... in any cathedral church . . . . whether during the celebration of divine service or at any other time, ... or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral, church, ... shall on conviction before two justices of the peace be liable to a penalty of not more than five pounds for every such offence, or may, if the justices before whom he shall be convicted think fit, instead of being subjected to any pecuniary penalty, be committed to prison for any time not exceeding two months."

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The facts stated in the case may, for the purposes of this report, be summarized as follows:—

On Sunday, February 28, 1904, the Bishop of London was conducting a service for the ordination of priests, and was in front of the Communion Table. The appellant walked up the choir with several others and came near to the bishop. The bishop read from the service book the words in the Ordination Service: "But yet if there be any of you who knoweth any impediment or notable crime in any of them for which he ought not to be received into this Holy Ministry, let him come forth in the name of God and shew what the crime or impediment is." The appellant then—reading from a paper—stated that he felt it incumbent upon him to make very serious objections to four out of the eight deacons who were candidates for the office of priest. The bishop at this point read an opinion given by Sir Lewis Dibdin, Dean of Arches, which was as follows:—

"I think it is clear that neither membership of an ultra High Church society, nor the candidate's intention to be ordained on the title of an incumbent who employs extreme (and I will assume illegal) practices in public worship, constitutes a 'notable crime' or an 'impediment' within the meaning of the Ordinal. It is obvious that neither is a 'crime,' and 'impediment' is a technical word importing those disqualifications for orders which are either absolute, as in the case of an unbaptized person, or only to be removed by special dispensation, as bastardy."

The Bishop then told the appellant, in effect, that unless the impediment alleged came under those heads he (the bishop) required the appellant to desist from reading his objections, and should prosecute him for brawling if he persisted in doing so. Out of the four deacons objected to three were not in fact present. The appellant proceeded to read his objections; but, on being informed by the bishop that the gentleman whose name was second on his (the appellant's) paper was not coming forward, he did not read his objection to that gentleman. He continued, however, reading his objections to the other three candidates for ordination. The objection to one of those

three, the Rev. Basil Saunders Dyer, was in the following terms: "I call the impediments serious, as they form a complete betrayal of the distinctive principles for which the Church of England exists. First, I object to Basil Saunders Dyer, who has been assisting at St. Matthias, Stoke Newington, and has been guilty of helping forward the effort to make our beautiful Communion Service resemble so far as possible the Roman Mass. On Sunday last in this church Roman vestments were worn, candles burned when not required for light, distinct acts of adoration were made to the elements, and out of a considerable congregation only four persons communicated. In this church there are separate sides assigned for men and women, but the number of men attendants is so small that half the space allotted to them is filled with ladies. Seven lamps are continually burning before the so-called altar. There is a distinct Roman request painted on the walls of the Lady Chapel—'Of your charity pray for the soul of'—then follow the names of four dead people."

After the appellant had finished reading his objections he left the cathedral with his party, and the service proceeded to its conclusion. His proceedings created some commotion.

The Court of quarter sessions affirmed the conviction. They stated their reasons, and the question for the opinion of the Court, thus:—

"We considered ourselves bound by the opinion of the Dean of Arches as to the meaning of the word 'impediment,' and as Mr. Kensit did not desist when informed by his Lordship that irregularities in matters of ritual would not, even if proved, constitute an 'impediment,' we affirmed the conviction, as we were of opinion that his subsequent conduct did 'disturb' the congregation within the meaning of 23 & 24 Vict. c. 32, s. 2.

"If, however, the Court should be of opinion that such practices as were alleged in the case of Mr. Dyer would, if proved, constitute an 'impediment,' then, as the bishop did not surcease until the complaint could be heard as required by the notice, Mr. Kensit was guilty of no illegal act, but was acting strictly within his right in coming forward when called upon by the bishop to do so in the name of God.

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"In the event of the Court holding that offences against ritual or doctrine do constitute an impediment, the conviction to be quashed; if otherwise, the conviction to stand."

Avory, K.C. (*H. C. Biron* and *Benjamin Whitehead* with him), for the appellant. First, assuming that the appellant took a wrong view as to what constituted a "notable crime" or "impediment," his conduct did not amount to the offence of "brawling." This Court has power to draw inferences of fact, and on the facts here no offence against the statute 23 & 24 Vict. c. 32, s. 2, was committed. If the bishop were wrong in his ecclesiastical law, it could be no offence for the appellant to go on reading his objections; and if the appellant honestly believed, even although he was wrong in the belief, that what he alleged in his objections did constitute a "notable crime" or "impediment," his conduct did not bring him within the statute. The kind of brawling meant to be punishable is shewn by the statute 5 & 6 Edw. 6, c. 4—"Against quarrelling and fighting in churches and churchyards." The 23 & 24 Vict. c. 32 was passed, as the preamble states, to abolish the jurisdiction of the Ecclesiastical Courts in certain cases of brawling, and that object is carried out by s. 1. In s. 2 the kind of brawling dealt with in the first part of the section is "riotous, violent, or indecent behaviour"; and in the second part "molesting" or "disturbing," &c., clergymen whilst conducting the services of the Church; but under both branches of the section the acts complained of must be "unlawful." An act done under a mistake, made bonâ fide, of law or fact is not necessarily unlawful. Anciently ordination was by acclamation of the people: Gibson's Codex, vol. i. p. 149; and the present practice has been substituted: see Blunt's Church Law, 7th ed. p. 197.

Next, the appellant did allege "an impediment or notable crime" within the meaning of the Ordination Service. Whether the allegation was or was not true could be inquired into by the bishop afterwards, but he was bound to hear the appellant's objection. The allegation that Mr. Dyer had taken part in adoring the elements is an allegation of an "impediment" and "notable crime." The adoration of the elements is contrary

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to Articles XXV. and XXVIII. of the Thirty-nine Articles, and to the passage at the end of the Communion Service with respect to kneeling. By 1 Eliz. c. 2, s. 4, parsons are made liable to imprisonment for not obeying the Book of Common Prayer. By 13 Eliz. c. 12, s. 2, persons holding ecclesiastical livings are made subject to deprivation if they maintain any doctrine contrary to the Thirty-nine Articles, and by s. 5 none shall be made minister, or admitted to preach or administer the Sacraments, unless he shall first subscribe to the said Articles. By the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), ss. 1 and 4, every person about to be ordained priest or deacon shall subscribe a declaration of assent to the Thirty-nine Articles and to the Book of Common Prayer, and of the ordering of bishops, priests, and deacons: see also Canon 36 of 1603, as revised in 1865. It is an "impediment" if the person seeking ordination cannot honestly make that declaration. Adoration of the elements is an offence which, in the case of a beneficed clergyman, would render him liable to deprivation; and, if that be so, it is an offence which would justify the bishop in refusing to institute to a benefice: *Heywood* v. *Bishop of Manchester* (1), judgment of Pollock B. There is no statutory definition of what is a "notable crime"; but the offences alleged by the appellant here are "impediments" if not "notable crimes." As to Sir Lewis Dibdin's opinion, a contrary opinion was given by the late Sir John Dodson and Sir Herbert Jenner in 1843. (2)

Danckwerts, K.C. (*C. W. Mathews* and *A. B. Kempe* with

(1) (1884) 12 Q. B. D. 404, at p. 414.

(2) Counsel read this opinion. It is printed in vol. xxv. of the *British Magazine*, which is to be found in the British Museum, and it is reprinted in a letter inserted in the issue of the *Record* newspaper of March 25, 1904. It appears from the letter in the *Record* that the opinion of Sir John Dodson and Sir Herbert Jenner was taken (inter alia) upon the meaning of the words in the Service for the Ordination of Priests: "But yet if there be any of you who knoweth any impediment or notable crime," &c.; and the second question asked in the case for opinion was:—

"May an impediment of a purely doctrinal nature, as Romish heresy for example, be stated?"

The answer of Sir John Dodson and Sir Herbert Jenner was:—

"We think that such an impediment, if it exist, may and ought to be stated."

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him), for the respondents. The justices were right in their conclusion. The appellant, on the facts stated in the case, committed the offence of "disturbing" the bishop within the meaning of 23 & 24 Vict. c. 32, s. 2, by persisting in reading out his objection after he had been required by the bishop to desist. It was for the bishop alone in his discretion to decide whether the objection should be proceeded with; he might think that it was not made bonâ fide. The allegations made by the appellant against the Rev. Mr. Dyer were not allegations of any "impediment or notable crime." "Notable crimes" are of the class specified in Lyndwood, p. 33, and Phillimore's Ecclesiastical Law, 2nd ed. vol. i. p. 94, as barring the admission of persons to holy orders, such as simony, homicide, being an excommunicated person, usury, and the like. "Impediments" originally included such matters as illegitimacy and certain physical defects which are no longer bars, but there still exist absolute impediments, such as being unbaptized, or under the age prescribed for candidates for ordination. The Ordination Service is exhaustive in respect of the admission of candidates for ordination either as priests or deacons, and there is no trace to be found in those services, or in any authority, that what was alleged by the appellant against the Rev. Mr. Dyer would constitute an "impediment." No absolute impediment was urged against him, and anything short of an absolute impediment was a matter within the discretion of the bishop. It is to be observed that the allegation was not that Mr. Dyer had himself adored the elements, but only that he had been curate at a church in which that and other ritualistic practices had been carried on. [He referred to *Clinton* v. *Hatchard*. (1)]

Avory, K.C., replied.

Cur. adv. vult.

April 12. The judgment of the Court (Lord Alverstone C.J., Kennedy and Ridley JJ.) was read by

LORD ALVERSTONE C.J. This is a special case stated by the quarter sessions of London, affirming a conviction by the Court of summary jurisdiction sitting at the Mansion House, upon an

(1) (1822) 1 Add. Ecc. 96.

information brought by the respondents, the Dean and Chapter of St. Paul's, against the appellant, John Alfred Kensit, for an offence under s. 2 of 23 & 24 Vict. c. 32—namely, for unlawfully disturbing the Right Rev. the Lord Bishop of London whilst celebrating the service of the rite of ordination in St. Paul's Cathedral on February 28, 1904. In the paper which was put in evidence in the proceedings and produced before us, the appellant stated that he felt it incumbent upon him to make very serious objections to four out of the eight deacons who were candidates on the occasion in question for the office of priest. The paper as regards Basil Saunders Dyer, the only one of the four mentioned in the paper who was in fact about to be ordained priest, was as follows: [His Lordship read the appellant's objection in respect of Mr. Dyer as set forth ante.] The objections to three of the gentlemen named were read by Mr. Kensit; but, as regards one, the second name on the paper, on the name being mentioned the Lord Bishop said, "That gentleman is not coming forward"; thereupon Mr. Kensit desisted from reading that part of the paper.

The Court of quarter sessions held that the matters admitted to have been alleged by Mr. Kensit were not "impediments or notable crimes" within the meaning of the rubric. The question raised for our decision was in the following terms:—

"If, however, the Court should be of opinion that such practices as were alleged in the case of Mr. Dyer would, if proved, constitute an 'impediment,' then, as the bishop did not surcease until the complaint could be heard as required by the notice, Mr. Kensit was guilty of no illegal act, but was acting strictly within his right in coming forward when called upon by the bishop to do so in the name of God.

"In the event of the Court holding offences against ritual or doctrine do constitute an 'impediment,' the conviction to be quashed; if otherwise, the conviction to stand."

In giving our decision upon this case we think it right to decide only the point upon which our opinion is asked by the Court of quarter sessions; but we desire to add that we are by no means sure that there was not sufficient evidence of an offence under the statute in that, after the bishop who was

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conducting the service had clearly stated to the appellant that the matters which he (the appellant) proposed to raise were not, in the opinion of the bishop, objections which came within the rubric, the appellant persisted in continuing to interrupt the service by reading from the paper. But, inasmuch as the Court of quarter sessions have not decided against Mr. Kensit upon this ground, or upon anything in connection with the way in which he made his protest, as we have said, we think it right to deal only with the point raised, and make the foregoing observations in order that it may not be supposed that we have formed an opinion in favour of the appellant upon the other points which were discussed in argument, but which were not raised in the case. Dealing now with the question raised, we are clearly of opinion that the matters contained in the protest of Mr. Kensit are not impediments within the meaning of the rubric. Mr. Avory in his argument went so far as to contend that Mr. Dyer in having assisted at St. Matthias', Stoke Newington, as stated in the protest, in which church distinct acts of adoration were made to the elements, had been guilty of a "notable crime"; and in support of his contention he relied upon Articles XXV. and XXVIII. of the Articles of Religion, and referred to s. 4 of the statute 1 Eliz. c. 2, and s. 5 of 13 Eliz. c. 12. We are, however, clearly of opinion that, even assuming that proceedings could be taken under these statutes in respect of the matters referred to in the appellant's protest, the allegations fall far short of anything which could be properly described as charging a candidate with a "notable crime," or alleging that there was in any of them any "impediment." The history of these words "notable crime" and "impediment" can clearly be traced in the ancient constitutions of the Church; and, to quote the Constitution of Archbishop Reynolds, cited in Lyndwood, p. 33 (see Phillimore's Ecclesiastical Law, vol. i. p. 94, 2nd ed.), would include such offences as are described in the words "no simoniac, homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having canonical impediment, shall be admitted into holy orders." The word "impediment" related originally to a number of matters, some

of which can no longer be regarded as such—as, for instance, bastardy, and certain physical defects as the loss of a limb or eye—but included impediments which would still be considered as a bar to ordination, such as the fact that the candidate was an unbaptized person or was not of the requisite age for the orders to which he proposed to be ordained. Without attempting in this judgment to give an exhaustive enumeration of what may be regarded as "notable crimes" or "impediments," there is not a trace to be found in any of the authorities that a mere allegation that a candidate has been a party to, or taken part in, the service in a church in which breaches of prescribed ritual have taken place comes within those words; and, to answer the question submitted to us, we are of opinion that such practices as were alleged against Mr. Dyer would not constitute an "impediment." It is well established that the fact that a claim of right is set up is no answer to an offence under this section: see *Asher* v. *Calcraft*. (1) In the course of the argument our attention was called to the opinion of Sir John Dodson and Sir Herbert Jenner given in 1843. Taken by itself, we must not be taken to concur in the statement in the second paragraph, that an impediment of a purely doctrinal nature, as Romish heresy, may and ought to be stated; but, taken as a whole, the opinion has no bearing upon the case now before us. For the above reasons we are of opinion that the conviction was right and that the appeal must be dismissed.

Judgment for the respondents.

Solicitor for appellant: *John Othen, Junr.*
Solicitors for respondents: *Lee, Bolton & Lee.*

(1) (1887) 18 Q. B. D. 607.

W. A.

1905
May 8, 9.

GALBRAITH *v.* POYNTON.

Manor—Copyhold—Obligation of Copyholder to repair—Breach of Obligation—Forfeiture—Action for Damages—Remedy of Lord against Executors of Copyholder.

The lord of a manor alleged a custom of the manor imposing upon the copyholders an obligation to keep their holdings in tenantable repair. For breach of this alleged obligation by a deceased copyholder in his lifetime the lord brought an action for damages against his executors as upon an implied contract to perform it. In support of the alleged custom he produced (1.) the customary of the manor, from which it appeared that the copyholders were entitled to house-bote to be used on their copyholds; (2.) entries in court rolls containing presentments by the homage when copyhold tenements were out of repair and forfeitures consequent on failure of the copyholders to repair them after presentment; also admittances of copyhold tenants containing licences to sublet provided all due reparations had been performed; (3.) oral evidence shewing that the copyholders had repaired their tenements as and when required by the lord without any presentment by the homage:—

Held, that this evidence, being referable to the customary law common to all copyhold tenure whereby a copyhold tenant is liable to forfeiture for waste, was no evidence of any custom imposing on the copyholders a liability from which a contract to keep their holdings in tenantable repair was to be inferred.

Blackmore v. *White*, [1899] 1 Q. B. 293, distinguished.

FURTHER CONSIDERATION before Bigham J.

The action, which was tried at Bristol Assizes, was brought by the lord of a manor against the executors of a deceased copyhold tenant for breach by him in his lifetime of an implied contract to keep his copyhold tenement in tenantable repair.

The plaintiff was lord of the vicarage manor of Chew Magna and Dundry, in the county of Somerset, in right of his vicarage of Chew Magna.

The defendants were the executors of the will, duly proved on January 5, 1904, of one Francis John Poynton, who died in November, 1903, seised of the copyhold tenement in question, situate in Chew Magna and being parcel of the said manor.

The copy of the court roll under which the said Francis John Poynton held was as follows: "Manor of the Vicarage of Chew Magna and Dundry. At the Court Baron of John

Hall, Clerk, Vicar of the Vicarage aforesaid and Lord of the Manor aforesaid there held the fourteenth day of June in the Second year of the reign of our Sovereign Lady Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and in the year of Our Lord one thousand eight hundred and thirty-nine by Peter Eaton Coates Gentleman Steward there—Homage, John Atheal Chiswell, Joseph Sevier, John Benjamin Dowling, Sworn.

"To this Court came Thomas Player of Pensford in the County of Somerset Land Surveyor and Mary Brune Poynton Granddaughter of the said John Hall and surrendered into the hands of the lord of the manor aforesaid One customary tenement of Old Auster (1) containing one fardle of land situate in West Chew and part of the manor aforesaid formerly in the occupation of Zachariah King or his undertenants afterwards of Thomas Evans since of Joseph Evans and Thomas Evans or one of them and now of the said Thomas Player or his undertenants Whereupon to the same Court came the said Thomas Player and Mary Brune Poynton and gave to the lord for a fine a competent sum of money being a nominal consideration of five shillings for the Estate and entry had in the premises as appears by the former copy To have and to hold the tenement aforesaid with the appurtenances unto the said Thomas Player and Mary Brune Poynton and also to Edward Hall Poynton, son of the said Thomas and Hannah Mary Poynton aged about twenty years, Francis John Poynton, son of the said Thomas and Hannah Mary Poynton aged about eleven years, and Henry Light, son of Joseph Light of Dundry in the County of Somerset Yeoman aged about twenty-three years, for the term of their lives and of every and either of them longest living successively according to the custom of the

(1) "*Astre* [adopted from Old French astre, aistre (Modern French âtre) 'hearth,' of unknown origin. . . .] A hearth, a home. Hence Astrer . . . . 1865, Nichols Britton II. 155, note, 'An astrer was a peasant householder residing at the hearth or home where he was bred.' 1882, Elton Orig. Eng. Hist. 191: '[In] Montgomeryshire austerland is that which had a house upon it in ancient times.'

"*Auster*, variant of Astre, hearth, home."—Oxford English Dictionary, sub voc.

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manor aforesaid Yielding and paying the yearly rent of three shillings and a heriot when it shall happen and doing and performing all other works, burthens, customs, and services therefor due and of right accustomed and so they have seisin of the said premises and the said Thomas Player is admitted tenant and did to the lord his fealty.

"At this Court licence is given and granted unto the said Thomas Player Mary Brune Poynton Edward Hall Poynton Francis John Poynton and Henry Light to demise and farm let the above mentioned tenement and premises or any part thereof with the appurtenances for any term or terms of years determinable on the deaths of them the said Thomas Player Mary Brune Poynton Edward Hall Poynton Francis John Poynton and Henry Light and the survivor of them provided the rents reparations burthens customs and services therefor due and to be due be paid performed and kept. John Atheal Chiswell. Joseph Sevier. John Benjamin Dowling."

The licence so granted had been acted upon by the grantees and had never been abandoned or revoked.

The statement of claim alleged a custom of the manor whereby the copyhold tenants thereof, their undertenants or assigns, were bound not to suffer their holdings to become and be in a ruinous, dilapidated, and untenantable condition, but to maintain the same in good, sufficient, and tenantable repair and condition.

In support of the alleged custom, the existence of which the defendants denied, the plaintiff produced in evidence the customary of the manor. This document was headed: "An abstract of the Customs used from beyond the memory of man concerning the customary tenants of the Manor of Wells parcel of the bishopric of Bath and Wells." It consisted of a list of thirty-one customs, of which the following alone are material:—

No. 23: "If a tenant die after our Lady Day the executor shall hold the tenement until Michaelmas paying the lord's rents. And if he die after Michaelmas his executor shall hold the winter leese of the said Copyhold until our Lady Day paying the lord's rent and shall be paid for earth and seed for so much

as is sown or else to have two parts of the corn at harvest And the lord or the reversioner to have the thirds."

No. 28: "Our custom is to have houseboat heiboat fire boat and plough boat without licence of the lord or steward to be taken or used on our Copyholds without making any wilful waste."

No. 29: "The custom is that any Copyholder may exchange any Timber for Timber to serve his turn for necessary uses as belongs to his Copyhold."

At the end of No. 31 was appended the following memorandum: "These customs have we according to our knowledge and remembrance set down affirming the same to be true Provided always that if at any time hereafter there shall any point of our custom happen to be in controversy by reason that the same may be through weakness of Memory hereby omitted or by unaptness of Words here set down arise to be a question or Doubt we do refer and leave the same to us and our successors always to be debated decided and determined by the Homage of the Court or Courts of the Manor aforesaid and not to the Common Laws of this Realm."

The plaintiff also relied upon entries in the court rolls of the manor, which contained admittances with licences to sublet similar in form to the admittance of and licence granted to the defendants' testator, dated June 14, 1839, and referred to above; also numerous instances of presentments by the homage from time to time that various copyhold tenements were out of repair, orders by the homage that the copyholders should repair the tenements either within six months or immediately, precepts directed to the bailiff of the manor commanding him to enter upon tenements which had become ruinous and to seize the same as and for a forfeiture of all the estate and interest of the copyholder, and forfeitures accordingly.

The plaintiff also gave oral evidence that he had himself on several occasions required copyholders to do such repairs as he considered necessary, and that those repairs had been done without question.

It was not disputed that the tenement in question was out

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of repair. The question was whether there was any implied contract to repair it.

Foote, K.C., and *Weatherley*, for the plaintiff. There is clear evidence that by the custom of this manor the copyhold tenants are bound to repair their tenements. If that custom is established, the mere fact of becoming a copyhold tenant creates a privity between the tenant and the lord, and imposes upon the former an implied contract to perform the duty imposed by the custom: *Blackmore* v. *White*. (1) That case is binding upon this Court and is conclusive of the present case; but the present case is even stronger in favour of the plaintiff, for, assuming that tenure of itself implies no contract or agreement to perform its incidental obligations, in this case a licence to underlet has been granted to the copyholder upon condition that he performs the due reparations; and this licence has been acted upon. These facts contain the necessary and sufficient elements of an implied contract to repair, for breach of which an action for damages may well lie.

Clavell Salter, K.C., and *Schiller*, for the defendants. Forfeiture for waste is an incident to all copyhold tenure. Waste is a repudiation of the tenure, which entitles the lord to seize without any custom in that behalf: Coke, Compleat Copyholder, s. 57; Com. Dig. Copyhold (M. 3); Scriven on Copyholds, 7th ed. p. 213; Watkins on Copyholds, p. 398 (marg. pp. 331, 332); Elton on Copyholds, 2nd ed. pp. 225 et seq. Accordingly, at periods fixed by the custom of the manor, the homage are sworn, and they thereupon make an inspection of the copyhold tenements of the manor, after which they come into the court of the manor and make presentment to the lord or steward of the manor that this or that tenement is out of repair, and that it must be repaired within some time named, which varies no doubt with the condition of the tenement. At the next inspection or perambulation of the homage after the expiration of the time named, if the tenement still remains out of repair, the homage make a presentment to that effect, and then the lord seizes the tenement. The

(1) [1899] 1 Q. B. 293.

forfeiture and antecedent presentments are entered on the court rolls. This or some similar proceeding may be said to be an incident common to all manors. All the evidence in this case is referable to this common obligation to repair sanctioned by presentment and forfeiture. There must be more than that to establish the custom on which the plaintiff relies—a custom imposing a contractual obligation the breach of which would give a cause of action for damages. Never before *Blackmore* v. *White* (1) was such a custom heard of. It may be that the evidence in that case proved the custom alleged, but in this case there is no such evidence. The customary of the manor, the authentic record of the customs, is silent as to any such custom, which is tantamount to a statement that no such custom exists. If so important a custom existed it must have been included. But if the customary of a manor negatives a custom, no evidence of its existence is admissible: *Duke of Portland* v. *Hill.* (2) The fact that the copyholders are entitled to house-bote cannot seriously be relied upon. This customary purports so far as possible, having regard to limitations of human memory and speech, to be an exhaustive list of the customs of this manor. If any evidence is admissible to prove a custom which has been omitted from the customary, the only admissible evidence is the finding of the homage. The licence at the end of the admittance of June 14, 1839, carries the case no further. If the reparations had not been performed the lord had a right to seize the copyhold, in which case a licence to underlet would be futile; therefore the licence is given provided the reparations have been performed. The other entries in the court rolls prove the defendants' case, namely, that the proper remedy for non-repair of the copyhold tenements was by way of presentment and forfeiture. The verbal evidence merely shews that some of the copyholders did the required repairs without waiting for a presentment by the homage.

Foote, K.C., in reply. There is nothing in law to prevent the existence of the custom. It is merely a matter of fact whether it exists or not. If it does exist, the custom may be

(1) [1899] 1 Q. B. 293. (2) (1866) L. R. 2 Eq. 765.

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enforced otherwise than by forfeiture, as, for example, by amercement: *Thorne* v. *Tyler* (1); Scriven on Copyholds, 7th ed. p. 319; or by injunction: *Richards* v. *Noble* (2); and that the court may by inferring a contract indirectly enforce the custom by an action for damages is conclusively established by *Blackmore* v. *White*. (3) The fact that a custom does not appear in the customary of the manor is not fatal to its existence: *Johnstone* v. *Earl Spencer*. (4) It may be established by a jury of the county—Scriven on Copyholds, 7th ed. p. 319—that is to say, by the ordinary tribunals of the country, whose jurisdiction cannot be ousted by any such clause as that appended to the customary. The argument for the defendants in the present case would have applied with equal force in *Blackmore* v. *White*. (3)

BIGHAM J. This action is brought to recover damages for breach of an implied contract alleged to be binding on the copyhold tenants of this manor to keep in tenantable repair their copyhold tenements. This contract is said to be implied, in accordance with the decision in *Blackmore* v. *White* (3), by the existence of a custom of the manor imposing on the copyhold tenants an obligation to keep their holdings in tenantable repair. The question in this case is whether any custom has been proved from which the alleged contract may be inferred imposing that obligation upon the tenants.

The custom is said to be established—first, by the customary of the manor; secondly, by entries in the court rolls; thirdly, by clauses in admittances of copyhold tenants; and, fourthly, by oral evidence.

I think that the customary, so far from proving the alleged custom, goes far towards disproving its existence. The customary is a solemn act drawn up by those interested in the manor and its customs declaring the customs binding the lord of the manor and the copyhold tenants respectively, and if the alleged custom existed in fact one would expect to find it plainly and simply recorded; yet the nearest approach to any

(1) (1642) Mar. 161.
(2) (1807) 3 Mer. 673; 17 R.R. 168.
(3) [1899] 1 Q. B. 293.
(4) (1885) 30 Ch. D. 581.

such custom is one by which the copyhold tenants are entitled to take from the land such wood as they may require for repairing their houses, or timber for the necessary uses of their copyholds. That is far from proving a custom binding the copyhold tenants to keep their houses in tenantable repair. By the customary law of copyhold tenure a copyhold tenant who fails to keep his tenement in repair is liable to incur a forfeiture of his estate, and it is not unreasonable to find a custom entitling him to take timber wherewith to repair his house and so avoid a forfeiture. I have come, therefore, to the conclusion that the customary of the manor contains no reference to the alleged custom.

Next it is said that the court rolls make mention of repairs from time immemorial done by copyhold tenants to their tenements; but the entries relied on amount to no more than this, that the homage from time to time pointed out to tenants that their tenements had fallen into disrepair and called upon them to put them into repair, because, if they failed to do so, they would be liable to incur a forfeiture of their tenements. These entries contain nothing to establish a custom binding the tenants to keep their property in tenantable repair. They merely record that members of the homage had done what it was their duty to do, namely, to indicate to the tenants in default the fact that they were in default, so as to give them an opportunity of making good their default and so avoiding a forfeiture. These court rolls, therefore, afford no evidence to satisfy me of the existence of the alleged custom.

Then as to the proviso relating to "reparations" appearing in admittances of copyhold tenants, especially that under which the defendants' testator claimed: here, again, I find no evidence of the custom on which the plaintiff relies. No doubt in a sense copyhold tenants are under an obligation to repair, but only in the sense in which the obligation is a common incident to all copyhold tenure, namely, that if the tenant fails to repair his tenement he is liable to incur a forfeiture, not in the sense that he is under any contractual obligation to keep it in repair.

The oral evidence in my opinion favours the defendants. It

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establishes that when the lord of the manor on certain occasions pointed out to copyhold tenants that their holdings were out of repair, and specified the repairs which he thought necessary, the tenants did the required repairs. I think it more probable that this was done, not by force of any obligation to pay damages, but merely to avoid formal presentment by the homage and consequent forfeiture, if it was not done. In short, all the evidence in this case is referable to the customary law incidental to all copyhold tenure and is consistent with an obligation enforceable, not by payment of damages, but by forfeiture. That puts an end to this case. If there is no such custom as alleged there is no implied contract; and if there is no implied contract there is no liability in damages. It is admitted that in the absence of contract, express or implied, there is no obligation as between the lord of a manor and the copyhold tenants of the manor binding the latter to repair their tenements or pay damages for omitting so to do. In *Blackmore* v. *White* (1) a custom was proved from which such a contractual obligation could be inferred, and that is the point upon which that case turned. Where such a custom exists the copyhold tenant may take subject to it. In the present case no such custom exists. There is therefore no implied contract, and consequently no right to damages. The lord is confined to his remedy by way of forfeiture. There must, therefore, be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Gribble, Oddie, Sinclair & Johnson, for William Agnew Fedden, Bristol.*

Solicitors for defendants: *Pilgrim & Phillips, for H. F. Poynton, Bristol.*

(1) [1899] 1 Q. B. 293.

A. P. P. K.

HOULDER *v.* WEIR.

1905
May 10.

Shipping—Charterparty—Rate of Discharge of Cargo—Fraction of a Day—Demurrage—Ballasting, Discharge of Cargo delayed by.

The provision in a charterparty that the cargo is to be discharged "at the average rate of not less than ——— tons per day" means, in the absence of other words in the charterparty pointing to a different conclusion, that it is to be discharged in a number of days calculated at that rate, not in a number of hours calculated at that rate; and that, if a fraction of a day is required for the completion of the discharge, the charterer is entitled to the whole of that day.

Yeoman v. *Rex*, [1904] 2 K. B. 429, distinguished.

Where the taking in of ballast during the process of discharge of cargo is necessary for the safety of the ship and of the cargo remaining on board, the fact that the taking in of the ballast delays the discharge of the cargo does not relieve the charterer from his obligation to complete the discharge within the stipulated time.

Case stated by an arbitrator.

On August 9, 1901, a charterparty of the ship *Comliebank* was entered into between Messrs. Andrew Weir & Co., the owners, and Messrs. Houlder Brothers, the charterers. By the charterparty the ship was to load at Cardiff a cargo of about 3500 tons of coal and deliver the same at Port Elizabeth, Algoa Bay. The only question in dispute between the parties was as to the amount of the demurrage that became payable by the charterers in respect of the discharge at Algoa Bay. By the charterparty the cargo was "to be received from alongside .... at the average rate of not less than 120 tons per weather working day, Sundays and holidays excepted, time to count twenty-four hours after arrival in Algoa Bay and captain's notification to charterers' agents that vessel is ready to deliver. Demurrage (if any) to be paid at the rate of 4*d.* per net registered ton per running day." The discharge was commenced on November 19, within twenty-four hours after captain's notification of readiness to deliver. The cargo consisted of 3483 tons of coal, the whole of which quantity with the exception of three tons could have been discharged in

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twenty-nine weather working days at the stipulated rate of not less than 120 per day. The arbitrator held that as the charterers were not bound to discharge at any quicker rate, and as there would have remained three tons to discharge after the expiration of the twenty-ninth day, they were entitled to thirty days for the discharge of the cargo.

All the thirty-five days from November 19 to December 23, both inclusive, were weather working days, but five of those days were Sundays. On two of these Sundays cargo was discharged, the consignees paying the extra expenses attendant on that discharge. There was an agreement between the master of the ship and the consignees that those two Sundays should not count as lay-days. It was contended by the owners that the master had no authority to make such an agreement. The arbitrator held that, as the charterparty expressly excluded Sundays from the computation of lay-days, the question of the master's authority to make such an agreement was immaterial.

On December 18, 19, 21, and 23, which were all weather working days, and none of which were Sundays, the vessel was not only discharging cargo, but was also taking in ballast, which latter operation necessarily retarded and reduced the rate of the discharge of the cargo. The ballasting was required for the safety of the ship and cargo, and was done in a reasonable way and so as not to interfere unnecessarily with the discharge of the cargo. It was contended by the charterers that those days should not count as lay-days, or at all events not as whole lay-days, because they did not have the full benefit of the days for discharging purposes. The arbitrator held that the charterparty amounted to an absolute contract by the charterers that the vessel should be discharged within the stipulated time unless the discharge within that time was prevented by the default of the shipowner or of those for whom he was responsible, and that the charterers when they entered into the charterparty knew, or ought to have known, that there would be a point in the discharge when the rate of discharge would be affected by the necessity for taking in stiffening. He accordingly held that the whole of the said four days counted as lay-days.

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The questions for the opinion of the Court were—

1. Whether, having regard to the quantity of cargo discharged, the charterers were entitled to twenty-nine or to thirty lay-days.

2. Whether the Sundays between November 19 and December 23 on which cargo was discharged should be reckoned as lay-days.

3. Whether days on which the vessel was taking in ballast as well as discharging cargo should be reckoned as lay-days.

Leck (*J. A. Hamilton, K.C.*, with him), for the charterers. The charterers were entitled to the whole of the thirtieth day in which to discharge the remaining three tons. Fractions of a day are not to be taken into consideration. The case of *Yeoman* v. *Rex* (1) is not in conflict with this contention. There the Court indeed held that upon the terms of a charterparty, which provided that the cargo should be discharged "at the average rate of not less than ——— tons per working day," a fraction of a day being required for the completion of the discharge of the cargo at the stipulated rate, demurrage began to run from the expiration of that fraction, and not from the end of the day. But there the charterparty went on to say that demurrage should be paid at so much "per ton per day and pro ratâ," which shewed that the intention of the parties in that case was that fractions of a day should be considered, and Mathew L.J. expressly rested his judgment on that ground. Here there is no provision for pro ratâ demurrage. And as the thirtieth day is not a whole day for the purpose of demurrage, it must be wholly a lay-day. In respect to the days on which ballast was taken in, the charterers ought only to be charged for the portions of the day during which the discharge was actually proceeded with. Those portions during which the shipowner was not ready to do his work of discharging cannot be treated as lay-days. If the shipowner prevents the charterer from performing his contract he cannot complain of the breach: see per Lord Esher, *Budgett* v. *Binnington*. (2) The arbitrator's view was that unless the ballasting and discharge were

(1) [1904] 2 K. B. 429.

(2) [1891] 1 Q. B. 35, at p. 38.

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done concurrently the ship might capsize; but the answer is that the shipowner must take on himself the burden of all that is necessary to make the ship seaworthy. It is as though the shipowner had taken off his men for the purpose of painting the ship, in which case he clearly could not hold the charterers to their contract.

Pickford, K.C., and *Balloch*, for the shipowners. Upon the first question the case of *Yeoman* v. *Rex* (1) is undistinguishable. Collins M.R. and Romer L.J. did not rely on the demurrage being payable pro ratâ. Romer L.J. expressly points out that the charterers' claim to be entitled to the whole of the day of which only a small portion was required for the completion of the discharge was in contravention of the provision that the discharge should be "at the average rate" of so many tons per day. Upon the second question, the provision that Sundays should be excepted merely meant that the charterers should not be bound to discharge on that day; it did not mean that if they chose to discharge on Sunday it should not be treated as a lay-day: *The Katy*. (2) The agreement of the master not to treat the Sundays as lay-days was unauthorized and not binding on the shipowners. As to the ballasting, the arbitrator found that it was a necessary incident of the discharge, one of the known incidents with reference to which the contract was entered into. There was here no prevention of the discharge by any act of the shipowners, and consequently the charterers cannot be excused.

Hamilton, K.C., in reply.

CHANNELL J. In this case I think the arbitrator was right on all the points. The first question arises with regard to the number of lay-days, whether there were twenty-nine or thirty. That depends upon the true construction of the clause in the charterparty which said that the cargo was "to be received from alongside . . . . at the average rate of not less than 120 tons per weather working day, Sundays and holidays excepted." That clearly means to be received from the ship in the time to be calculated at the average rate of not less

(1) [1904] 2 K. B. 429. (2) [1895] P. 56.

than 120 tons per day. And the point in dispute between the parties is whether it means in a number of days to be calculated at the average rate of 120 tons per day, or whether it means in a number of hours to be calculated at that average rate. In *Yeoman* v. *Rex* (1), where the charterparty provided that the cargo should be discharged at the average rate of so many tons per working day, it is true that the Court held that fractions of a day might be taken into consideration, but they did so upon the ground that there were other words in the charterparty which pointed to the conclusion that that was what was intended. It seems to me that that case must be treated as an exception to the general rule that fractions of a day are not to be taken into consideration. I think I must hold here that the clause means that the cargo should be discharged in the number of days to be arrived at by taking an average rate of not less than 120 tons per working day. Arrived at in that way, the period amounting to twenty-nine days and a fraction must be counted as thirty days. The next question is whether the Sundays upon which cargo was in fact discharged should be treated as lay-days, or whether they should be excluded from the computation. By the terms of the charterparty Sundays were expressly excluded. Neither party was bound to work on those days, and if any work was in fact done it could only be done by permission of the master. If no conditions were attached to that permission it would have to be treated as a mere permission to work overtime, and consequently the fact of working would not prevent the time from being excluded from the lay-days. But here the case goes further, for the arbitrator has found that the permission was given upon the terms that the days should not be counted. The remaining question is whether the days on which the vessel was taking in ballast as well as discharging cargo should be reckoned as whole days or not. I think they ought. When Lord Esher in *Budgett* v. *Binnington* (2) said that "if the shipowner by any act of his has prevented the discharge, then, though the freighter's contract

(1) [1904] 2 K. B. 429. (2) [1891] 1 Q. B. 35, at p. 38.

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is broken, he is excused," he was referring to a case in which the shipowner's act preventing the discharge was in breach of his obligation to give the charterer all facilities for the discharge. But here the act of the shipowner which delayed the discharge was not a breach of any obligation of his. The taking in of ballast in the course of the discharge was a thing necessary to be done. When part of the cargo has been discharged something must be done to keep the ship upright for the safety of the remainder of the cargo as well as of the ship itself. Under those circumstances the case stands on the same footing as that of the discharge of the cargo being prevented by some act beyond the control of the shipowner, and consequently, though the charterers have been prevented from having the full benefit of those days, they must be treated as whole days.

Award of arbitrator upheld.

Solicitors for Houlder Brothers & Co.: *Templer Down & Miller.*

Solicitors for Andrew Weir & Co.: *T. Cooper & Co.*

J. F. C.

[CROWN CASES RESERVED.]

1905
May 20.

THE KING *v.* TIDESWELL.

Criminal Law—Larceny—Pretended Purchase—Passing of Property.

The prisoner was in the habit of buying from time to time from a manufacturing company portions of the accumulated ashes of the company's works. The only agreement made between the managing director of the company and the prisoner with respect to such purchases was as to the price per ton, the prisoner being at liberty to take from the accumulation as much as he required, upon the understanding that the amount of his purchase in each case should be determined by the weight as ascertained by the company's weigher. It was the duty of the company's weigher to enter in a book a record of the weights of the ashes purchased to enable the company to charge the purchasers with the proper amounts. The company's weigher fraudulently and in collusion with the prisoner weighed and delivered to the prisoner 32 tons 13 cwt. of the ashes and entered the weight in the book as being 31 tons 3 cwt. only:—

Held, that on these facts the prisoner was rightly indicted for larceny of 1 ton 10 cwt.

CASE stated by the chairman of the Staffordshire Quarter Sessions for the consideration of the Court for Crown Cases Reserved.

1. The prisoner was tried on an indictment charging him—

(*a*) With feloniously stealing 1 ton 10 cwt. of casters' ashes on January 23, 1904, the property of Allen Everitt & Sons, Limited.

(*b*) With receiving the said goods on the date aforesaid well knowing them to have been stolen.

(*c*) With feloniously stealing 1 ton 6 cwt. of casters' ashes on April 21, 1904, the property of the said Allen Everitt & Sons, Limited.

(*d*) With receiving the last-mentioned goods on the said date well knowing them to have been stolen.

2. It was proved that the prisoner had been a customer of Allen Everitt & Sons, Limited, for a number of years, purchasing waste and residual metal products from them. A man named Ephraim Kaye was employed by Allen Everitt & Sons, Limited, as general metal weigher, and it was his duty to weigh out

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waste and residuals, and to enter in a book, called the residual metal book, a record of such weights for the purpose of enabling the customers to be charged in the books of the company with the proper weights. It was also the duty of Ephraim Kaye to keep another book, called the receipt-book, in which he took from the customers signed receipts for the weights of waste and residuals taken by them.

3. On January 23, 1904, Ephraim Kaye weighed and delivered into trucks of the railway company a quantity of casters' ashes, a residual metal product the property of Allen Everitt & Sons, Limited, weighing in fact 32 tons 13 cwt. Ephraim Kaye made out a receipt for these casters' ashes by the prisoner in his receipt-book describing them as weighing 31 tons 3 cwt. only, and this receipt was on January 23 signed by the prisoner, who was charged with that amount only in the books of the company. On January 20 and 23 the prisoner made out two consignment notes to the railway company in his own handwriting for 19 tons 9 cwt. and 13 tons 4 cwt. respectively of casters' ashes, amounting together to 32 tons 13 cwt.

4. On April 21, 1904, Ephraim Kaye weighed and delivered into two trucks of the railway company a quantity of casters' ashes, the property of Allen Everitt & Sons, Limited, weighing in fact 12 tons 16 cwt. 2 qrs. The prisoner on April 20 signed a receipt made out by Ephraim Kaye in his receipt-book for 11 tons 10 cwt. 2 qrs. only, and was charged with that weight in the books of the company. The prisoner on April 21 made out a consignment note to the railway company in his own handwriting for 12 tons 16 cwt. 2 qrs. of casters' ashes.

5. Ephraim Kaye, who on being charged with the aforementioned felonies before magistrates at petty sessions pleaded guilty and was sentenced to three months' imprisonment, was called on behalf of the prosecution, and stated that he entered the lesser weights in the residual metal book and receipt-book intentionally, and that he kept a private book, to which he referred at the trial, in which he entered all the correct weights of goods weighed out to the prisoner, who obtained these correct weights from him or through being present at the

time they were entered. He said that he had no previous arrangement or understanding with the prisoner that he was to be charged for less casters' ashes than were to be sent, and that he could not say that he had ever told the prisoner that he was being charged for less than the actual weights on any occasion, and that there was no understanding as to any particular deduction from weights, though (he added) deductions were as a matter of fact made; but the prisoner had given him sums of money from time to time as a reward for these services generally, though not as a payment in respect of any particular transaction. All the casters' ashes that were put into the railway company's trucks were loaded in the ordinary course of business between Allen Everitt & Sons, Limited, and the prisoner.

6. On this evidence it was objected by counsel for the prisoner that the indictment was not supported by the evidence on the ground that there was no proof of the larceny or receiving by the prisoner of any specific goods.

7. I overruled the objection, but consented to reserve the point for the consideration of the Court for Crown Cases Reserved. I told the jury that if they believed the evidence for the prosecution their duty was to find the prisoner guilty. The jury found the prisoner guilty.

March 18. *Vachell*, for the prisoner. The ashes put into the trucks were never divided, so that it was impossible to say which particular tons or hundredweight were stolen. "In larceny some particular article must be proved to have been stolen": per Alderson B., *Reg.* v. *Lloyd Jones*. (1) Secondly, the evidence shews that the property in the whole of the ashes weighed out by Kaye passed from the prosecutors: Sale of Goods Act, 1893, s. 18, rule 3.

R. W. Coventry, for the prosecution. It is enough to specify the amount stolen although it forms part of a larger bulk. Kaye had no authority from the prosecutors to transfer the property in any portion of the ashes except to the extent of the entry made by him in the residual metal book. And

(1) (1838) 8 C. & P. 288.

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the prisoner, knowing that he had no such authority, got no property in the excess: *Reg.* v. *Hornby.* (1)

The Court ordered the case to be remitted to the quarter sessions with directions that the following questions should be answered:—

(*a*) Was there any previous or contemporary contract between the prisoner and Allen Everitt & Sons, Limited, or any authorized agent or servant of Allen Everitt & Sons, Limited, other than Kaye, either for the sale of these ashes or the sale of any quantities of ashes? If so, the particulars of the terms of the contract should be set out.

(*b*) Was there any contract between the prisoner and Kaye for the sale of the ashes on either of the dates laid in the indictment? If so, the particulars of the contract should be set out.

In accordance with that order the chairman stated as follows:—

The evidence at the trial did not disclose any such contract as referred to in paragraph (*a*) or in paragraph (*b*). The managing director of the prosecutors stated in evidence that the prisoner was a customer as buyer of residuals, and that he had sold as much as 3000*l.* in value to the prisoner, and that he had known the prisoner fifteen years in the way of business. The practice appears to have been that when Allen Everitt & Sons, Limited, had an accumulation of waste residuals or ashes they sent for the prisoner, who saw the managing director and arranged verbally with him to buy so much as he should require of the bulk at so much per ton. No specific quantities would be mentioned, the understanding being that the quantities purchased should be defined by the weighing. The ashes the subject of the indictment formed part of one of these accumulations.

May 20. *R. W. Coventry*, for the prosecution.

Vachell, for the prisoner. The property in the whole of the truck-loads passed to the prisoner as soon as they were separated from the bulk and weighed and put into the trucks for the prisoner. For nothing else remained to be done to pass

(1) (1844) 1 C. & K. 305.

the property. Whatever fraud was afterwards perpetrated could not alter the fact. The prosecutors intended the whole of the goods to go to the prisoner, for by the terms of the arrangement he was to take as much as he pleased. What the prosecutors were deprived of was not a certain quantity of goods, but a part of the price.

LORD ALVERSTONE C.J. Upon the point reserved for our consideration upon the case as originally stated, namely, whether the indictment for larceny could be supported in the absence of proof of larceny of any specific portion of the goods, I entertained no doubt whatever. But in the course of the argument a question was raised as to whether the property in the goods had not already passed to the prisoner at the time of the fraudulent entry in the weight-book, and whether consequently, whatever other criminal offence he might have committed, he could be properly charged with larceny; and as we thought the case did not sufficiently state the facts with respect to that matter we sent it back to be restated. The question whether the prisoner's offence amounts to larceny must depend upon the circumstances under which he received the goods. Suppose the owner of a flock of sheep were to offer to sell, and a purchaser agreed to buy, the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep and ascertain the exact number of the flock, and subsequently the purchaser were to fraudulently arrange with the bailiff that whereas there were in fact thirty sheep they should be counted as twenty-five, and the purchaser should be charged with twenty-five only, there would be no larceny, because the property would have passed to the purchaser before the fraudulent agreement was entered into. On the other hand, if the owner were to leave it to his bailiff to arrange the sale, authorizing him to sell as many sheep out of the flock as the purchaser should be willing to buy, then if the contract of sale arranged between the bailiff and the purchaser was expressed to be for twenty-five sheep and the whole thirty were fraudulently delivered to the purchaser, the obtaining possession of the five sheep as to which there was no contract of sale would amount to larceny. In the

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Lord Alverstone C.J.

present case, as restated, it appears that there was no contract with the managing director that the prisoner should buy the whole of the ashes in the trucks, but only such a quantity as should be defined by the weighing; in other words, there was no contract of purchase except that made with Kaye. That being so, the case is governed by the principle of *Reg.* v. *Hornby* (1), where the prisoner received goods from the servant of the owner under colour of a pretended sale, and it was held that the fact of his having received the goods with the knowledge that the servant had no authority to sell, and was in fact defrauding his master, was sufficient to support an indictment for larceny. I am of opinion that the conviction in this case must be upheld.

LAWRANCE J. I am of the same opinion.

KENNEDY J. I agree in the statement of the law by my Lord, and I also think that upon the case as originally stated it was not clear that the facts shewed the prisoner to have been guilty of larceny within that statement. It was contended that what took place was an arrangement whereby the property passed to the prisoner. If there had been a completed contract with the managing director or some other official of the company covering all the goods in the trucks, then no doubt the property would have passed, and no subsequent fraud would make the receipt of the goods larceny. The offence in such a case would be only a conspiracy to defraud the sellers of part of the price. But here, on the facts as now stated, there was no intention by the prosecutors to pass the property except in such goods as should be ascertained by the weighing—that is to say, in the smaller quantity. Consequently there was a larceny of the balance.

CHANNELL J. I agree. It appears to me that the question whether the prisoner could properly be convicted of larceny depends upon whether there was a contract between Allen Everitt & Sons, Limited, and the prisoner for the sale of the

(1) 1 C. & K. 305.

casters' ashes other than a contract made through the agency of the fraudulent man Kaye. To take the illustration given during the argument of the sale of sheep. If a farmer sells all the sheep in a field to a purchaser at so much per head, but not knowing for certain how many sheep there are sends his servant with the purchaser to count them, and the servant and the purchaser fraudulently agree to say that there were only nineteen sheep when there really were twenty, there is no larceny because all the sheep have been sold by their owner to the purchaser, but the purchaser and the servant have conspired to defraud the owner of the price of one sheep. If however a farm bailiff, having authority to sell his master's sheep in the ordinary way, says to a purchaser, "There are twenty sheep in the field belonging to my master, but he does not know how many there are; you can take them all; I will tell my master you had nineteen only, and you can pay him for nineteen and give me a present for myself," there is clearly a larceny of one sheep, and that whether the bailiff professes to sell the twenty sheep or whether he professes to sell nineteen only, for the fraud of the servant is known to the purchaser, and no property passes in the twentieth sheep by the act so known to be fraudulent even if the bailiff professes to part with the property in it. *Reg.* v. *Hornby* (1) is a distinct authority for this. It is a decision of Coltman J. alone, but it appears to be good law. *Reg.* v. *Middleton* (2) also supports this view, and so do all the cases as to what is usually called larceny by a trick. In the case supposed it would be impossible to say which of the twenty sheep was the one which had been stolen, but it could not be said that that would prevent a conviction. The suggested difficulty in the present case of identifying the ton and a half of casters' ashes which was stolen is, in my opinion, no more fatal than the difficulty as to the sheep would be. In the present case the jury must be taken to have found that the prisoner was a party to the fraud, and though he may not have known what quantity was on any particular occasion to be given to him without paying for it, or even that on a particular parcel being handed to him some

(1) 1 C. & K. 305. (2) (1873) L. R. 2 C. C. 38.

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Channell J.

part would be so given to him (for Kaye doubtless would only commit the fraud when the circumstances presented a reasonable probability of its being done without detection), yet the prisoner must be taken to have known before the transactions the subjects of this indictment that Kaye would probably do on this occasion what he had clearly done on others, and in the cases when he did so there would be a larceny committed by both, though in the other cases, when the stuff was correctly weighed, there would be none. On these points I find no difficulty, but in the case as originally stated there was nothing to shew whether the whole transaction of the sale of the casters' ashes was carried through by Kaye, or whether the limited company by any other officer or agent made a contract for the sale.

PHILLIMORE J. I entirely agree.

Conviction affirmed.

Solicitors for the Crown: *Parish & Co., Birmingham.*

Solicitors for prisoner: *Ford & Ford, for A. J. O'Connor, Birmingham.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1905
May 29.

NELSON *v.* EMPRESS ASSURANCE CORPORATION, LIMITED.

FABER, THIRD PARTY.

Practice—Third-party Procedure—Insurance (Marine)—Policy of Reinsurance—Order XVI., r. 48.

Where in an action on a policy of marine insurance the defendants sought under Order XVI., r. 48, to bring in as a third party the underwriter of a policy of reinsurance on the same subject-matter:—

Held, that the third-party procedure was not applicable to such a case, inasmuch as a contract of reinsurance was not one of "indemnity" within the meaning of the rule.

APPEAL from the refusal by Bigham J. at chambers to rescind an order of a master giving to the defendants in the action leave to issue and serve a third-party notice.

The action was upon a policy of insurance effected by the plaintiff's agents on his behalf with the defendants on cattle for a voyage from the United Kingdom to Buenos Ayres.

The insurance was expressed to be against the risks usually covered by a marine policy "on 7 Bulls, 30 heifers, 1 cow and calf; on and/or under deck, including all risks of mortality, jettison, and washing overboard; warranted free from all claim (except for general average, salvage, and special charges) in respect of animals which may walk ashore, or are capable of walking, after leaving the ship at port of destination, but to include risk of mortality for three days after landing of animals . . . . each animal to be deemed a separate insurance." It was provided that, "in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about the defence, safeguard, and recovery of the said subject-matter of insurance, without prejudice to this assurance; to the charges whereof the said corporation will contribute according to the rate and quantity of the sum herein assured."

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The plaintiff by his points of claim alleged that there had been a constructive total loss of each and all of the animals insured by perils insured against, and he further claimed for expenses and special charges in respect of the said animals under the "sue and labour" clause. Alternatively, if there had not been a total loss of the animals, he claimed as for a partial loss, and also, under the "sue and labour" clause, he claimed from the defendants their proportion of a certain total sum, of which particulars were given.

The defendants had reinsured the cattle which formed the subject-matter of the above-mentioned policy by a policy of reinsurance, which had been underwritten by one Faber and other underwriters at Lloyd's. This policy was expressed to be a reinsurance of the Empress Assurance Corporation applying to policy No. 69,454 (the original policy of insurance) upon cattle as per original policy, subject to the same clauses and conditions as the original policy, and to pay as might be paid thereon. It contained the following clause: "Warranted free from particular average, jettison, washing overboard, and mortality, unless caused by the ship being stranded, sunk, on fire, or in collision, the collision to be of such a nature as may be reasonably supposed to have caused or led to the damage claimed for." It also contained a "sue and labour" clause in terms similar to those in the original policy.

The defendants obtained leave from a master to issue and serve, and accordingly issued and served, on Faber a third-party notice under Order XVI., r. 48. The third party applied to Bigham J. at chambers for an order rescinding the order of the master and setting aside all proceedings under it. The learned judge dismissed the application.

Scrutton, *K.C.*, and *Leck*, for the third party. There is no precedent for bringing in the underwriter of a policy of reinsurance as a third party in an action on the original policy. The contract of reinsurance is not one of "indemnity" within the meaning of the rules as to bringing in third parties. The contract of indemnity contemplated by those rules is a contract by a person to indemnify the defendant against the claim of

the plaintiff. The contract of reinsurance is not such a contract, though all contracts of marine insurance are spoken of as contracts of indemnity in another sense. The underwriter of a policy of marine insurance has such an interest in the subject-matter of the insurance as entitles him to insure that subject-matter on his own account. The underwriter of the policy of reinsurance insures the original underwriter in respect of that subject-matter, but he does not "indemnify" him against the claim of the assured in the proper legal sense of the term. The contract of insurance and that of reinsurance are independent contracts: see *Mackenzie* v. *Whitworth* (1); *Johnston* v. *Salvage Association*. (2)

Assuming that the contract of reinsurance could be treated as a contract of indemnity within the meaning of Order XVI., r. 48, the bringing in of a third party is a matter of discretion; and the present case is a very unsuitable one in which to apply the third-party procedure to a contract of reinsurance. The terms of the two policies are very different; and a large part of the claim in the action is for matters in respect of which the third party cannot be liable to the defendants under the policy of reinsurance. That policy contains a warranty against particular average; and the plaintiff claims against the defendants alternatively for a partial loss. Again, part of the plaintiff's claim against the defendants is under the "sue and labour" clause in the original policy. The expenses which the defendants would be entitled to claim against the third party under the "sue and labour" clause in the policy of reinsurance are not the same as those which the plaintiff could claim against the defendants under the "sue and labour" clause in the original policy; for the "factors, servants, or assigns" of the plaintiff would not be the "factors, servants, or assigns" of the defendants: see *Uzielli* v. *Boston Marine Insurance Co.* (3)

Carver, K.C., and *F. T. R. Bigham*, for the defendants. The contract of reinsurance is one of "indemnity" within the meaning of Order XVI., r. 48. The fact that this has never

(1) (1875) 1 Ex. D. 36. (2) (1887) 19 Q. B. D. 458.
(3) (1884) 15 Q. B. D. 11.

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been expressly decided in any case may easily be accounted for by the fact that in these cases the underwriter of the policy of reinsurance generally intervenes voluntarily. The contract of reinsurance expressly refers to the original contract of insurance and incorporates its conditions and clauses, and the underwriter of it is to pay as is paid on the original policy. If there was a constructive total loss of the subject-matter of insurance, the reinsurance was, it is submitted, clearly a contract of indemnity as to that loss. As regards the claim for expenses under the "sue and labour" clause, there is no doubt more difficulty on account of the decision in *Uzielli* v. *Boston Marine Insurance Co.* (1) It is not altogether easy to understand that decision; but that case is not on all-fours with the present, for there the underwriters of a Lloyd's policy reinsured with a French company, who reinsured with the defendants, and the expenses claimed were expenses incurred by the intermediate insurers, the French company. Here the expenses claimed are expenses incurred by the assured under the original policy. The contention of the third party really deprives the "sue and labour" clause in the policy of reinsurance of all effect. That policy incorporates all the clauses and conditions of the original insurance; and it is submitted that under it the expenses recoverable by the plaintiff from the defendants under the "sue and labour" clause in the original policy are recoverable over by the defendants from the third party. *Johnston* v. *Salvage Association* (2) is no authority for the present case, for in that case there was no question of reinsurance. The defendant, having insured his ship by a policy containing a "sue and labour" clause, sought to bring in the underwriter as a third party to an action brought against him by the plaintiff for work and labour done by the plaintiff at the defendant's request in endeavouring to save the ship. It is quite clear that in such a case there is no contract by the underwriter to indemnify the defendant, the two contracts being wholly independent. Whatever view may be taken as to the claim for expenses under the "sue and labour" clause, it is submitted that the order to bring in the third party should stand,

(1) 15 Q. B. D. 11. (2) 19 Q. B. D. 458.

inasmuch as, with regard to the claim for a total loss, the policy of reinsurance is a contract of indemnity. There is no need that the defendants' claim for indemnity against the third party should go to the whole of the plaintiff's claim.

Scrutton, K.C., in reply.

MATHEW L.J. I think this appeal must be allowed. The rule under which the application to bring in the third party is made has been in existence for many years, and policies of reinsurance have been in existence for a still longer period, but this appears to be the first occasion on which it has been sought to apply the rule in the case of such a policy. The decisions establish that the contract of insurance and that of reinsurance are independent of each other, the underwriter of the original policy of insurance being entitled to insure on his own account the interest which he has acquired in the safety of the subject-matter of insurance by reason of the fact of his having contracted to insure it. The condition that the underwriter of the policy of reinsurance is to pay as may be paid on the original policy does not in my opinion import, as suggested, that the contract is one of indemnity. The assured under a policy of reinsurance must, like any other assured, shew that there has been a loss of the subject-matter of insurance by a peril insured against by the policy of reinsurance. It is contended that the contract of reinsurance must be looked upon as one of indemnity within the meaning of Order XVI., r. 48. Having regard to the nature of that contract, it does not appear to me that it can be so treated. If the contract of reinsurance were one of indemnity, the underwriter of the original policy when sued on his contract might give notice to the underwriter of the policy of reinsurance that he did not wish to contest the claim, and that, if that underwriter would not pay, he would defend the action, and would afterwards claim to be indemnified by him against the costs of the defence. No one ever heard of such a position being assumed by the assured under a policy of reinsurance. Moreover, the policy of insurance and that of reinsurance being independent contracts, I think considerable inconvenience

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might arise if the underwriter of a policy of reinsurance were to be brought in as a third party with regard to some part only of the subject-matter of an action on the original policy of insurance. It might turn out that no question of liability common to the original underwriter and the underwriter of the policy of reinsurance was ultimately decided by the action; and then the third party would have been cited and additional expense incurred for nothing.

I am not prepared to create a precedent for the application of the third-party procedure to cases such as the present.

COZENS-HARDY L.J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *W. A. Crump & Son.*

Solicitors for third party: *Waltons, Johnson, Bubb & Whatton.*

E. L.

COWES URBAN DISTRICT COUNCIL AND EAST COWES URBAN DISTRICT COUNCIL *v.* SOUTHAMPTON, ISLE OF WIGHT, AND SOUTH OF ENGLAND ROYAL MAIL STEAM PACKET COMPANY, LIMITED.

1905
March 31;
May 15.

Ferry—Disturbance—Ferry from Vill to Vill—Change of Circumstances—New Traffic.

A franchise of ferry from vill to vill is a right known to the law.

Under an indenture of lease from the Crown conveying a "ferry or right of passage across the river Medina between East Cowes and West Cowes in the Isle of Wight," together with two landing-places, one in West Cowes and the other in East Cowes, the plaintiffs claimed an exclusive right of ferry between any point on the east bank and any point on the west bank of the river within East Cowes and West Cowes respectively. East Cowes and West Cowes were two populous districts. The termini of the ferry, which was an ancient ferry, had always been two defined points, though not always the same two points, one on each bank of the river:—

Held, that the indenture conveyed a right of ferry between the two landing-places, and not an exclusive right of ferry between any point on the east bank and any point on the west bank of the Medina within East Cowes and West Cowes respectively.

Semble, that East Cowes and West Cowes are not vills in such a sense that an exclusive right of ferry between them could be sustained in point of law.

The defendants, a steamboat company carrying passengers in steamers between the mainland and Cowes, conveyed those and other passengers in steam-launches between East Cowes and West Cowes, embarking and landing them at two pontoons distant respectively 230 yards and 875 yards north of the landing-places of the plaintiffs' ferry. The evidence shewed that the defendants' launches dealt with a traffic which had recently come into existence, and which was different from that dealt with by the plaintiffs:—

Held, that there had been no disturbance of the plaintiffs' ferry.

FURTHER CONSIDERATION before Kennedy J., after trial of the action at Winchester Assizes.

The following statement of the facts is taken almost exclusively from the written judgment of Kennedy J.

The plaintiffs claimed an injunction and damages in respect of an alleged wrongful interference by the defendants with

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their right of ferry or passage across the river Medina between East Cowes and West Cowes, in the Isle of Wight. The defendants denied the right as claimed by the plaintiffs, and, further, denied that they had been guilty of any actionable interference with any right of the plaintiffs.

The title of the plaintiffs rested upon an indenture of lease dated August 13, 1901, and made between the King's Most Excellent Majesty of the first part, John Francis Fortescue Horner, the Commissioner of Woods in charge of the land revenues of the Crown in the county of Hants, of the second part, and the plaintiffs of the third part. This indenture was made under the authority of the Cowes Ferry Act, 1901 (1 Edw. 7, c. lxxxviii.), which was, according to its title, "An Act to empower the Urban District Councils of Cowes and East Cowes to take on lease the existing Royal ferry across the river Medina between their respective districts, and to work and manage the same, and for other purposes." The indenture, after reciting that His Majesty was entitled in right of His Crown to an ancient ferry across the river Medina between East Cowes and West Cowes, that there had been constructed upon certain parts of the foreshore of the river Medina belonging to His Majesty in right of his Crown certain piers and landing-places which were coloured red in the plan annexed to the indenture, and that an agreement for the grant to the plaintiffs of a lease from the Crown of the foreshore, piers, and landing-places had been made between the Commissioner of Woods and the plaintiffs, proceeded as follows: "In pursuance of the said agreement and in consideration of the yearly rent hereinafter reserved and of the covenants hereinafter contained the said John Francis Fortescue Horner . . . . doth demise and lease unto the said councils their successors and assigns All that ferry or right of passage across the river Medina between East Cowes and West Cowes in the Isle of Wight . . . . And also all those pieces of foreshore on each side of the said river with the piers hards or landing-places erected or constructed thereon for the embarking and landing of passengers animals carriages conveyances and goods conveyed across the said ferry which said pieces of foreshore are

delineated and coloured red on the plan annexed to these presents."

It appeared from the evidence that the rights of ferry had never in fact been exercised except between one point on the western and one point on the eastern bank of the Medina. Before 1860 the ferry had been worked by row-boats, which plied between two points known as the Old Ferry Steps, a little to the northward of the present ferry stages. Up to that time the ferry had been managed by persons appointed by the Governor of the island. Between 1860 and 1901, during which period a limited company known as the Cowes Ferry Company and the defendants successively had been lessees of the ferry, a floating steam-bridge and suitable landing-stages and accessory buildings had been set up or acquired by the lessees on the present site of the ferry. From 1901 to the date of the action the ferry had been conducted by the plaintiffs upon the same site by means of the steam-bridge, and also by row-boats or barges. The fare charged by the plaintiffs was one halfpenny for each passenger.

The defendants were a steamboat company owning a number of steamboats which carried passengers to and fro between the mainland and the Isle of Wight. In the year 1866 they had a pontoon on the west bank of the Medina in West Cowes at a distance of 875 yards to the northward of the present landing-place of the ancient ferry on the same bank. In that year they took a lease, and in the following year they became absolute owners of a pontoon in East Cowes on the east bank of the Medina at a distance of 230 yards to the northward of the present landing-place of the ancient ferry on that bank. The public had a right of access to the river along a small portion of the defendants' landing-place in West Cowes. For the use in the first instance of their own passengers going from the mainland or from their West Cowes landing-place to East Cowes, or from thence to West Cowes or the mainland, the defendants had at the date of this action and at the date of the passing of the Cowes Ferry Act, 1901 (1 Edw. 7, c. lxxxviii.), a service of steam-launches plying between their East Cowes and West Cowes landing-places. This cross-river traffic was commenced

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many years before 1901, at a time when the defendants were also working the ancient ferry as assignees of the Cowes Ferry Company. From the first, however, the defendants did not limit the use of the launches to persons who had come to Cowes from the mainland, or were intending to leave Cowes for the mainland by the defendants' steamers. From the commencement on payment of a fare of 1*d.* any one could cross the river on the defendants' steam-launch. They did not carry vehicles as the plaintiffs' steam-bridge did. As their West Cowes pier was half a mile nearer the seaside and the more fashionable part of West Cowes than the steam-bridge, it offered greater convenience to persons residing in or visiting that portion of the district; and the eastern landing-place was somewhat more convenient in point of distance for persons living in or visiting Osborne and the northern part of East Cowes than was the eastern terminus of the steam-bridge. The West Cowes Railway Company had a terminus near to the defendants' West Cowes landing-place, and arrangements had been established for the carriage of luggage between the two places. A passenger for East Cowes arriving at the West Cowes railway terminus would have to take his luggage about half a mile in order to reach the western terminus of the plaintiffs' ferry.

Apart from persons using the defendants' steamers, the largest supply of passengers who used the steam-launches was contributed by summer visitors who in recent years had been brought to Cowes in very large numbers by excursion steamers not owned by the defendants, especially since the erection in the year 1902 of a public pier, somewhat to the north of the defendants' West Cowes landing-place, called the Victoria Pier, where these excursion steamers and also the defendants' steamers discharged passengers. In the year 1904, 24,835 persons landed from steamers at the Victoria Pier of whom between one-fourth and one-fifth were brought by the defendants' steamers. An increase in this passenger traffic was also due to the opening of Osborne to visitors; and the establishment of the Royal Naval College at Osborne had added to the number of persons who found the defendants' steam-

launches a great convenience. They had also been utilized by the Post Office in order to effect a material saving of time in regard to the transmission of some local and mainland mails.

In order to accommodate the cross-river traffic to which all the above sources contributed, the defendants ran their steam-launches between their landing-places on the Medina according to a published time-table framed principally to provide for their own arriving and outgoing steamers; but they also considered the railway time-tables, and in August and September, 1904, an additional launch ran half-hourly between noon and 6.30 P.M. Until this launch was advertised the plaintiffs had raised no objection to the defendants' launches. The service of this additional launch was discontinued after September, 1904.

As to the condition of the plaintiffs' ferry, its traffic, which included vehicles as well as foot-passengers, had been throughout progressive; on some occasions there had been that which one witness called a "glut" of traffic owing to a special press of vehicles. Generally the steam-bridge with its accessory row-boats provided adequately for the wants of persons coming to the ferry, and it could have carried many of the defendants' passengers across the Medina if they had disregarded their own convenience and had gone out of their way to follow the steam-bridge route.

Foote; *K.C.*, *Clavell Salter*, *K.C.*, and *J. A. Simon*, for the plaintiffs. A ferry is a franchise granted by the Crown or acquired by prescription, which implies a grant from the Crown, entitling the owner of the franchise to carry persons over water between two termini. The termini must be in places where the public have rights as towns or vills, or highways leading to towns or vills: *Huzzey* v. *Field*. (1) There are two kinds of ferry known to the law: (i.) a ferry which is a highway over water uniting two highways by land, and (ii.) a ferry from vill to vill. There may be a ferry across a river from one town to another, as, for example, across the Humber from Kingston-upon-Hull to Barton: *Tripp* v. *Frank* (2); or

(1) (1835) 2 C. M. & R. 432; 41 R. R. 755.
(2) (1792) 4 T. R. 666; 2 R. R. 495.

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across the Mersey from Birkenhead to Liverpool: *Pim* v. *Curell.* (1) Ferries of this latter kind are well recognised: *Huzzey* v. *Field* (2); *Matthews* v. *Peache* (3); *Newton* v. *Cubitt.* (4) There is, therefore, nothing in law to prevent the Crown granting an exclusive right of ferry between East Cowes and West Cowes; and that the Crown has granted that right in fact is clear from the terms of the indenture of August 13, 1901, and is also indicated by the preamble and by ss. 1 to 15 of the Cowes Ferry Act, 1901 (1 Edw. 7, c. lxxxviii.). Further, the grantee of a ferry of this description naturally selects the most convenient route. In former times this ferry did not ply between the same points as it does now. But the grantee of a ferry from one point to another, such as a ferry connecting two highways, cannot change the termini. Therefore this must have been originally a ferry from vill to vill, and not from one highway to another.

The carriage of passengers by the defendants in their steam-launches is a disturbance of the plaintiffs' franchise. A disturbance is actionable as a nuisance, and may be committed either by carrying in the direct line of the plaintiffs' ferry or so near thereto as injuriously to affect his right: 2 Roll. Abr. 140, pl. 4; *Huzzey* v. *Field* (5); *Newton* v. *Cubitt.* (4) The defendants in the present case are carrying passengers in the direct line of the plaintiffs' ferry, who have the right to carry passengers between any point in East Cowes and any point in West Cowes. It is, therefore, no answer for the defendants to say that their pontoons are respectively 230 yards and 875 yards from the plaintiffs' landing-places.

But even assuming that the plaintiffs have only a right of ferriage between two fixed points, one on each side of the river, the defendants' launches ply so near to the plaintiffs' ferry as to constitute a disturbance: *Huzzey* v. *Field.* (5) In the case of a ferry from vill to vill, an increase in the population of the vills between which the ferry exists does not justify a stranger in establishing a rival ferry between the same vills.

(1) (1840) 6 M. & W. 234; 55 R. R. 600.
(2) 2 C. M. & R. 432, at p. 442.
(3) (1855) 5 E. & B. 546, at p. 557.
(4) (1862) 12 C. B. (N.S.) 32.
(5) 2 C. M. & R. 432; 41 R. R. 755.

An increase in the number of persons to be served by the ferry must be taken to have been contemplated when the franchise was granted. If the service is inadequate there are means of compelling the grantee to supply better accommodation: 2 Roll. Abr. 140, pl. 4; 3 Bl. Com. 219; *Hopkins* v. *Great Northern Ry. Co.* (1); and if he fails to do so the Crown may revoke the grant: *Peter* v. *Kendal* (2); but a new ferry cannot be established except by means of a fresh grant from the Crown: *Paine* v. *Partrich* (3); *Huzzey* v. *Field.* (4)

C. A. Russell, K.C., H. J. H. Mackay, and *S. H. Emanuel,* for the defendants. In all cases relating to the disturbance of ferries two questions are to be considered: (1.) the extent of the plaintiff's right, and (2.) whether the right when ascertained has been invaded.

As to the extent of the plaintiffs' right, this must be measured by the terms of the grant, whether actual or presumed, from the Crown, as controlled by the common law of the land. The grant must not be unreasonably wide, for then it is in restraint of trade: *Churchman* v. *Tunstal.* (5) Where a district is sparsely populated so that more than one ferry could not be carried on at a profit, there the exclusive right of ferriage from or to any point in that district may be valid in law. But an exclusive right of ferriage between two such populous districts as East Cowes and West Cowes has not here been granted in point of fact, and if it had it could not be sustained in point of law, because it would be unreasonable. A right of ferry between two districts does not imply a right to insist on carrying passengers from the whole extent of each shore: see per Maule B. in *Pim* v. *Curell.* (6) The form of declaration in an action for disturbance of a ferry used to allege a right in the plaintiff to ferry "from or to a certain place" within the district: *Giles* v. *Groves* (7); *Blacketer* v. *Gillett* (8); and see *Matthews* v. *Peache.* (9) The indenture of August 13, 1901,

(1) (1877) 2 Q. B. D. 224, at p. 232.
(2) (1827) 6 B. & C. 703; 30 R. R. 504.
(3) (1691) Carth. 191.
(4) 2 C. M. & R. 432; 41 R. R. 755.
(5) (1659) Hardr. 162.
(6) 6 M. & W. 234, at p. 260.
(7) (1848) 12 Q. B. 721.
(8) (1850) 9 C. B. 26.
(9) 5 E. & B. 546.

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created no new right; it merely conveyed the right as it existed, i.e., a right of ferry between two fixed points: *Londonderry Bridge Commissioners* v. *M'Keever*. (1) The Cowes Ferry Act, 1901, does no more. The result is that the plaintiffs' ferry must be regarded as a ferry from and to one point on the west bank to and from one point on the east bank of the Medina. Then the fact that the defendants, as part of a voyage to and from the mainland from and to East Cowes, carry passengers in their steam-launches between East and West Cowes is no infringement of the plaintiffs' right: *Tripp* v. *Frank* (2); *Huzzey* v. *Field*. (3)

The convenience of the public is the basis of the grant, actual or presumed, of the franchise: *Hopkins* v. *Great Northern Ry. Co.* (4) When the convenience of the public ceases to be served the time has come for the grant of a new ferry, and pending the grant the establishment in fact of a new ferry is not actionable: *Newton* v. *Cubitt*. (5) The facts in the present case shew conclusively a change of circumstances and the development of a new and different traffic with which the defendants do, and the plaintiffs cannot, conveniently deal.

[Counsel for the plaintiffs resigned any claim to an injunction restraining the carriage of through passengers—that is to say, persons carried by the defendants across the Medina as part of a continuous transit between East Cowes and the mainland, the rest of which had been performed, or was to be performed, on board the defendants' steamers.]

Cur. adv. vult.

May 15. KENNEDY J. delivered a written judgment, which, after stating the effect of the indenture of August 13, 1901, and of the evidence as to the user by grantees of the ancient ferry as above, continued as follows:—The plaintiffs contend that the demise and lease to them under the indenture of 1901 is a demise and lease of an exclusive right of ferry between any point on the east bank of the Medina and any point on the west bank of the Medina between East Cowes and West

(1) (1891) 27 L. R. Ir. 86, 464.
(2) 4 T. R. 666; 2 R. R. 495.
(3) 2 C. M. & R. 432, at p. 442.
(4) 2 Q. B. D. 224.
(5) 12 C. B. (N.S.) 32.

Cowes; and, therefore, that the defendants, who have been and now are carrying passengers across the Medina in steam-launches between points both of which are situate to the northward of the plaintiffs' steam-bridge, have thereby been guilty of an infringement of the plaintiffs' legal right.

It is convenient to deal first with this broad contention. Now, there is sufficient authority for the proposition that there may be a franchise of ferry "from vill to vill," as well as from highway to highway. "A ferry," said Coleridge J. in *Matthews* v. *Peache* (1), "may be granted in more or less extensive terms. If Doust here could shew a legal grant of the right of exercising a ferry from any landing-place in the Isle of Dogs to any landing-place in Greenwich that, whether convenient or not, would be the extent of the ferry. That, however, would impose upon the owner of the franchise the obligation of keeping boats enough to carry passengers from all those points, and of maintaining such boats in repair." In the earlier case of *Huzzey* v. *Field* (2) Lord Abinger C.B., pronouncing the judgment of the Court of Exchequer, defined a ferry in these terms: "A public ferry, then, is a public highway, of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. The right of the grantee is in the one case an exclusive right of carrying from town to town, in the other of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side." And in the leading case of *Newton* v. *Cubitt* (3) Willes J., delivering the judgment of the Court of Common Pleas, which on appeal was adopted simply by the Exchequer Chamber (4) in regard to the nature of a ferry, used this language: "A ferry exists in respect of persons using a right of way, where the line of way is across water. There must be a line of way on land coming to a landing-place on the water's edge, ... or, where the ferry is from or to a vill, from or to one or more landing-places in the vill."

The first contention in the argument of the plaintiffs' counsel

(1) 5 E. & B. 546, at p. 557.
(2) 2 C. M. & R. 432, at p. 442.
(3) 12 C. B. (N.S.) 32, at p. 58.
(4) 13 C. B. (N.S.) 864.

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in this action is that West Cowes should be treated as a "vill" and East Cowes as a "vill," and that they have acquired a monopoly of ferriage across the Medina throughout the whole length of the river Medina so far as the banks of that river are within either district, and to construe the words "The Royal Ferry" in the Act of Parliament and the words "An ancient ferry" in the first recital of the indenture of lease to mean an exclusive right of this large extent. In my judgment this contention ought not to succeed. I feel considerable doubt as to whether either East or West Cowes, if treated as including the extensive area on either bank of the Medina which the plaintiffs' contention requires, is a "vill" within the meaning of that legal term, as used in the judgments which I have cited: see Jacob's Law Dictionary "vill," and Co. Litt. s. 171, p. 115 b. I incline to think, looking at the maps which were put in evidence, that the area is on each side of the Medina rather a district than a "vill," and that it may justly be inferred from the observations of Maule B. in reference to Mr. Cresswell's argument in *Pim* v. *Curell* (1), and the language of Willes J. in *Newton* v. *Cubitt* (2), that the Crown could not make a valid grant of a monopoly of ferriage throughout such a district. Be this, however, as it may, it appears to me that the language of the indenture which I have quoted ought naturally to be construed in the more restricted sense for which the defendants contend—namely, as giving to the plaintiffs the right of ferry at the point where the steam-bridge now is. I can see nothing which should cause me to interpret the language differently in the other portions of the indenture or in those sections of the Act of Parliament to which Mr. Clavell Salter properly called my attention. The actual user makes for the same view. There is no evidence of any Royal right of ferry ever having been exercised except between one point on the West Cowes and one point on the East Cowes bank of the Medina, substantially, although not precisely, where the ferry is now and was at the date of the indenture of lease. I think that the wording of the lease is perfectly appropriate to the demise of such a ferry, as it has always been in actual use.

(1) 6 M. & W. 234, at p. 260. (2) 12 C. B. (N.S) 32, at p. 58.

I now come to the consideration of the second contention of the plaintiffs. This is that the plaintiffs, even if their ferry rights are as limited as I hold them to be, are entitled to succeed in this action against the defendants because the defendants have been guilty of an unlawful disturbance of their rights, by reason, to borrow the language of Willes J. in *Newton* v. *Cubitt* (1), of the proximity of the new passage across the water to the ancient ferry. The facts material to the consideration of this contention are these. [The learned judge then proceeded with the statement of facts as above set out, and continued:—]

In this state of things, ought I to hold that the defendants have been guilty of an actionable disturbance of the plaintiffs' right of ferry, and that the plaintiffs are entitled to the remedy which they seek in this action by obtaining an injunction in respect of the carriage of passengers across the Medina or, at all events, according to the concession which the plaintiffs' counsel stated at the hearing of the argument that his clients were willing to make, an injunction as to the carriage of all passengers except those who may be described as "through" passengers—that is to say, persons who are carried across the Medina as part of a continuous transit between East Cowes and the mainland the rest of which has been performed, or is to be performed, on board one of the defendants' steamers? So far as legal principle is involved in finding the right answer to this question, there is nothing to be gained from the cases beyond what appears in the judgment in *Newton* v. *Cubitt* (2), which I have already cited, and the judgment in *Hopkins* v. *Great Northern Ry. Co.* (3) In the earlier case Willes J. said: "The principle by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the

(1) 12 C. B. (N.S.) 32, at p. 60.
(2) 12 C. B. (N.S.) 32, at p. 59.
(3) 2 Q. B. D. 224, at pp. 231, 232.

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line of those ways across a water highway." In the later case Mellish L.J., delivering the judgment of the Court of Appeal (Lord Coleridge C.J., Mellish L.J., and Brett and Amphlett JJ.A.), said: "They" (the authorities) "establish that although it has been laid down in a very early case (1)—'If I have a ferry by prescription, and another erects another ferry on the same river near to it by which my ferry is injured, that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I shall be grievously amerced'; and there are other authorities to the same effect; yet it does not conclusively follow, as a matter of law, that because a new ferry diverts some of the traffic from an old ferry it is actionable, and it may be that no action can be maintained in respect of the new ferry, if it has been set up bonâ fide for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry."

Applying the principles which I understand to be laid down by these judgments to the facts of the present case, I am of opinion that my judgment in this action must be for the defendants. Their line of ferry is at neither terminus identical with the plaintiffs' ancient ferry, differing in this respect, I may point out, from all the cases up to and including *Newton* v. *Cubitt* (2) which have been brought to my notice. It is at the western, the more important, end of the ferry, nearly half a mile distant from the ancient ferry. I have as regards local circumstances credible, and indeed strong, evidence adduced before me that, apart from the advent of the railway to West Cowes and the position of the terminus on that side, and apart from the establishment of the Royal Naval College and the opening of Osborne to visitors on the other side, there has grown up and now exists in West Cowes, to the west and north of the defendants' ferry, a number of residents and visitors who could not without considerable inconvenience lose the advantage of that ferry. Such persons before its commencement used occasionally at least to hire watermen's boats in order to cross the Medina on account of the inconvenience and delay which would be involved in going southward for half a mile or more to the

(1) 2 Roll. Abr. 140, pl. 4. (2) 12 C. B. (N.S.) 32.

ancient ferry. I find that there has been in recent years a considerable change of circumstances and a new condition created by the growing development of excursion traffic and the building of the Victoria Pier, which places annually thousands of visitors upon the shore of the Medina near to the defendants' ferry, and at such a distance from the line of the ancient ferry that those of them who wish to go by ferry to East Cowes, would, if compelled to use the plaintiffs' steam-bridge, necessarily incur considerable trouble and waste of time, and in some cases, as, for example, where the passengers had luggage, a waste of money also. I find that the traffic from all these sources passing over the Medina by the defendants' steam-launches may fairly be treated as a new traffic, for the traffic on the ancient ferry is at the same time not diminishing but an increasing and progressive traffic. I give my judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Clarkson, Greenwell & Co., for Damant & Sons, Cowes.*

Solicitors for defendants: *Sandford & Co.*

A. P. P. K.

1905
April 3.

FIRTH, Appellant; McPHAIL, Respondent.

Local Government—Offences—Diseased Meat—"Depositing for the Purpose of Sale"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 28, *sub-s.* 1.

A person who has deposited, on premises other than his own, for the purpose of sale, diseased meat belonging to him and intended for the food of man, does not thereby commit any of the offences in respect of dealing with diseased meat which are specified in s. 117 of the Public Health Act, 1875, as amended by s. 28, sub-s. 1, of the Public Health Acts Amendment Act, 1890.

Case stated by the stipendiary police magistrate for the city and county of Kingston-upon-Hull.

An information in writing was laid before the magistrate by the respondent, an inspector of nuisances to the Hull Corporation and duly authorized to lay the information, alleging that the appellant, contrary to the form of the statute in such case made and provided, was on May 4, 1904, the person to whom belonged the carcase of a cow, which was on that day deposited in the slaughter-house occupied by one Charles Brader in Sewer Lane, Hull, for the purpose of sale and was intended for the food of man, and was lawfully seized by the respondent as such inspector of nuisances, it then appearing to him to be diseased, and being at the time of such seizure in fact diseased, and that the same carcase was afterwards adjudged by the stipendiary magistrate to be diseased, and condemned by him, and ordered to be destroyed. (1)

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 116: "Any . . . . inspector of nuisances may at all reasonable times inspect and examine any animal carcase meat . . . . exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal carcase meat . . . . appears to such . . . . inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

Sect. 117: "If it appears to the justice that any animal carcase meat . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same

The following facts were proved before the magistrate :—

On the 1st or 2nd of May, 1904, the cow in question, then being the property of W. Bristow, a person living near Goole, was killed when at the point of death from internal inflammation. The diseased carcase was afterwards dressed, and the appellant, knowing the circumstances connected with the slaughter of the cow, purchased the carcase from Bristow on the evening of May 2, 1904, having previously on that day arranged with C. Brader, a meat salesman carrying on business at Sewer Lane, Hull, to consign it to him for sale. On May 4 the appellant deposited the carcase at Brader's premises in Sewer Lane for the purpose of sale, and it was intended to be for the food of man. The carcase was seized on the same day by the respondent, and was subsequently condemned and ordered to be destroyed by the stipendiary magistrate as being diseased and unfit for human food.

For the appellant it was contended before the magistrate that, as there had been no exposure of the carcase for sale, and it had not been found in the appellant's possession or on his premises, he had not committed any offence under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890. [Part III. of the Act of 1890 had been adopted by the corporation of Hull.]

For the respondent it was contended that s. 28 created a new

and order it to be destroyed . . . . and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal, carcase . . . . or piece of meat . . . . so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months."

The Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III. s. 28, sub-s. 1: "Sects. 116 to 119 of the Public Health Act, 1875 (relating to unsound meat) shall extend and apply to all articles intended for the food of man, sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale within the district of any local authority."

Sub-s. 2: "A justice may condemn any such article, and order it to be destroyed or disposed of, as mentioned in s. 117 of the Public Health Act, 1875, if satisfied on complaint being made to him that such article is diseased, unsound, unwholesome, or unfit for the food of man, although the same has not been seized as mentioned in s. 116 of the said Act."

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offence, and applied the penalties of s. 117 of the Act of 1875 to persons who had sold unsound meat, or had deposited it in any place for the purpose of sale, or of preparation for sale.

The magistrate was of opinion that the contention for the respondent was right, and he accordingly convicted the appellant and sentenced him to two months' imprisonment.

The question for the opinion of the Court was whether the magistrate, upon the facts stated in the case, came to a correct determination in point of law. If he did, the conviction to stand; if he did not, the conviction to be reversed.

Clarke Hall, for the appellant. This conviction was wrong. No offence under s. 117 of the Public Health Act, 1875, was committed by the appellant, because the diseased meat was never exposed for sale, or found in his possession or on his premises. Sect. 28, sub-s. 1, of the Public Health Acts Amendment Act, 1890, does not create any new offence; it only extends the application of ss. 116, 117 of the Act of 1875 to all articles intended for the food of man. The word "sold" in s. 28, sub-s. 1, was introduced in order to meet cases like *Vinter* v. *Hind* (1), where the inspector had seized diseased meat whilst in the hands of a person to whom it had been sold by a butcher, and the Court held that the meat was not "so seized" and condemned as is prescribed in ss. 116, 117 of the Public Health Act, 1875, and, therefore, that the butcher was not liable to a penalty under s. 117. Sub-s. 2 of s. 28 of the Act of 1890 shews the kind of difficulty which was intended to be removed. The decision in *Barlow* v. *Terrett* (2) covers the present case. Sect. 47 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), corresponds with ss. 116, 117 of the Public Health Act, 1875, and in sub-s. 2 the person to whom the meat seized or liable to be seized "belongs or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose possession or on whose premises the same was found," is made liable to a fine, &c. The words, "or deposit for the purpose of sale, or of preparation for sale," were inserted to meet the decision in

(1) (1882) 10 Q. B. D. 63. (2) [1891] 2 Q. B. 107.

Barlow v. *Terrett* (1), and it is to be noted that the Legislature used language quite different from that in s. 28 of the Public Health Acts Amendment Act, 1890.

Danckwerts, K.C. (*G. F. Mortimer* with him), for the respondent. The magistrate came to a right conclusion. The decision in *Barlow* v. *Terrett* (1), which case arose under a different statute, was wrong. Sect. 116 of the Public Health Act, 1875, gives the inspector power to seize diseased meat deposited in any place for the purpose of sale. Sect. 117 enables the justice to condemn the meat "so seized," and order it to be destroyed. The words "the person to whom the same belongs" mean "belongs at the time of seizure," and the following words "or did belong at the time of exposure for sale" are disjunctive. The intention was to enable the owner of the meat to be punished if it has passed into different hands when it is found to be either deposited for the purpose of sale or exposed for sale; but before there can be a conviction for any offence under s. 117 mens rea must be shewn against the person accused: see *Wieland* v. *Butler-Hogan*. (2) Where mens rea exists, as the case finds it did here, all difficulties arising on ss. 116, 117 are removed. Further, the case is within s. 28, sub-s. 1, of the Public Health Acts Amendment Act, 1890, which extends and applies all the provisions of s. 117 of the Act of 1875 to articles deposited in any place for the purpose of sale. The word "sold," which is introduced in s. 28, shews that the Legislature had in mind the creation of new offences. The Public Health (London) Act, 1891, does not affect this question. By inserting the words in s. 47 "or deposit for the purpose of sale" it was probably intended to make it clear that what was already made an offence in other parts of the country should be an offence also in the metropolis.

Clarke Hall, in reply. Mens rea is not necessary to constitute an offence under s. 117 of the Public Health Act, 1875: *Blaker* v. *Tillstone*. (3) The words "belongs or did belong" in that section refer to one time and event only—the time of exposure for sale.

(1) [1891] 2 Q. B. 107. (2) (1904) 73 L. J. (K.B.) 513.
(3) [1894] 1 Q. B. 345.

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LORD ALVERSTONE C.J. My mind has fluctuated during the course of the arguments in this case. Mr. Danckwerts' contention that the conviction was right in view of s. 28, sub-s. 1, of the Public Health Acts Amendment Act, 1890, to which I will refer presently, has much to recommend it on broad principles, but I think we cannot give effect to that contention. It is true that the statutes in question ought, if possible, to be so construed as to make them effective to prevent diseased meat and other kinds of food being sold to persons who may not themselves be able to detect whether the meat or food is good or not. It must be remembered, however, that that particular evil is met to some extent by the power given to seize the meat, and that the additional punishment of the persons who have done, or have been parties to, that which has been done, though it may be desirable in order to prevent the thing being done again, does not afford any direct protection to the public in respect of the meat which has been seized. We have to remember, also, that s. 117 of the Act of 1875 is a penal section enabling the penalties of fine or imprisonment to be imposed on persons convicted thereunder, and we have to say whether that section, taken by itself or as amended by the subsequent Act, is wide enough to enable a penalty to be inflicted upon a man where he has deposited for the purpose of sale diseased meat belonging to him, but the meat has not been exposed for sale. Taking s. 117 by itself, I think that we cannot disregard the reasoning of Sir John Day in *Barlow* v. *Terrett* (1), which reasoning undoubtedly applies to the case now before us. Both the members of the Court in *Barlow* v. *Terrett* (1) expressed their regret that they were obliged to decide in favour of the defendant, which points to their having a strong view that the statute could not be construed in the way for which Mr. Danckwerts has contended here. Sect. 116 provides for the seizure of diseased meat exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man. Sect. 117 provides that the justice may condemn the article seized, and order it to be destroyed, and goes on to say, "and the person to

(1) 10 Q. B. D. 63.

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whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found," shall be liable to a penalty, &c. We have not to consider in this case the words "in whose possession or on whose premises the same was found." I may say here that I see no reason to doubt the decision in *Blaker* v. *Tillstone*. (1) I think that, having regard to the particular language of the section and to the object of the Legislature, there is no reason why the person who has actually in his possession the article intended for the food of man should not be liable to the penalty, and that was the view which this Court took in *Wieland* v. *Butler-Hogan* (2), though we held that there was no evidence of the article having been intended for the food of man after it had become bad. I therefore do not think that we can give effect to the argument that mens rea, or guilty knowledge, is necessary in every offence under the section. Reverting to the words "and the person to whom the same belongs or did belong at the time of exposure for sale," it may be that the Legislature thought that the seizure and forfeiture of the meat was a sufficient protection unless there had been an exposure for sale, and I confess I am unable to read the words "and the person to whom the same belongs" as meaning "belongs at the time of seizure," because, taking all the words together, the more natural construction of that part of the section seems to me to be that exposure for sale is a condition which must have existed before the penalty under that section can be inflicted upon anybody. Passing to s. 28 of the Act of 1890, I am not able to read sub-s. 1 as extending and applying the penal provisions of s. 117 of the Act of 1875 to all articles intended for the food of man "deposited in any place for the purpose of sale, or of preparation for sale." Those words occur in s. 116, and it is too strong to say that the penal part of s. 117 has been extended in the sense of doing away with that which was, if I am right, a specific condition precedent to the power to inflict a penalty—namely, exposure for sale. In my opinion the true view of s. 28, sub-s. 1, is that it extends the provisions of ss. 116 and 117 to all articles intended for the food of man.

(1) [1894] 1 Q. B. 345. (2) 73 L. J. (K.B.) 513.

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It is true that the introduction of the word "sold" may afford some ground for the contention that articles in a different category to articles exposed for sale were also to be dealt with under those two sections. But, if that be so, it does not, in my view, strengthen the argument for the respondent in this case; because, if it be right to say that there has been an extension of the law in this respect, it is an extension which in ordinary circumstances is in respect of something which occurs after the exposure for sale has taken place. The Public Health (London) Act, 1891, cannot be altogether disregarded; it was an amending Act, and words are put in s. 47 to make clear that depositing for the purpose of sale, or of preparation for sale, was to be an offence in the metropolis. Having regard to the language of s. 28, sub-s. 1, of the Public Health Acts Amendment Act, 1890, I cannot accept the view that those words were only put in because in other parts of the country s. 117 of the Public Health Act, 1875, had already been made to apply to depositing for the purpose of sale, or of preparation for sale, and it was desired to bring about the same result in the metropolis.

For these reasons I am of opinion that the view taken by the magistrate was not correct. The case is one of difficulty, but I am of opinion that the conviction ought not to be upheld.

KENNEDY J. I am of the same opinion. The point raised is a difficult one, the statutes having left the matter in such a condition that it is not easy to form a definite opinion upon the meaning of the Legislature.

RIDLEY J. I concur. I think also that the matter is one requiring a minute examination; but on the whole I am satisfied that the judgment delivered by the Lord Chief Justice is right.

Judgment for the appellant. Conviction quashed.

Solicitors for appellant: *Woodhouse & Davidson, for J. T. Woodhouse, Aske & Ferens, Hull.*

Solicitors for respondent: *Sharpe, Parkers & Co., for E. Laverack, Town Clerk of Hull.*

W. A.

In re MOSS.
Ex parte HALLET.

1905
May 22.

Bankruptcy — Principal and Surety — Mortgage of Policy of Insurance — Covenant to pay Interest and Premiums — Indemnity of Surety by Principal — Bankruptcy of Principal — Proof of Surety for estimated Amount of Liability to pay future Interest and Premiums — Double Proof.

By an indenture of mortgage the mortgagor assigned to the mortgagee a policy of insurance on the mortgagor's life to secure the repayment of an advance of 500*l.* which the mortgagor covenanted to repay on a certain date, and the mortgagor and another person as surety jointly and severally covenanted with the mortgagee to pay interest so long after the said date as any principal money remained due, and to pay all premiums on the policy, and, if the policy should become void, the cost of effecting a new policy. The mortgagor subsequently agreed to indemnify the surety against any sums which he might be called upon to pay under his covenants with the mortgagee. No part of the principal money was repaid, and the mortgagor became bankrupt. The mortgagee proved in the bankruptcy for the principal money less an amount at which he valued the policy. The surety claimed, under the agreement to indemnify, to prove for the estimated amount of his liability to the mortgagee for future interest and premiums :—

Held, that the surety was not entitled to prove under either head.

APPEAL from a decision of the judge of the Hertfordshire County Court affirming the rejection by the trustee of the appellant's proof for two sums of 813*l.* and 600*l.*

The facts were as follows :—

By an indenture dated October 24, 1901, Moss, the debtor, mortgaged to Hallet, the appellant, together with other security, a policy of insurance on the life of Moss to secure an advance of 700*l.* at 10 per cent. interest then made by Hallet to Moss.

By an indenture dated December 11, 1901, and made between Moss of the first part, Hallet of the second part, and one Cooke of the third part, in consideration of the sum of 500*l.* then advanced by Cooke to Moss, Moss covenanted to repay that sum on March 11 next with interest at the rate of 10 per cent., and Moss and Hallet jointly and severally covenanted to pay to Cooke "interest thereon so long after that day as any principal money remains due under these presents after the same rate by

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equal quarterly payments"; and Moss as beneficial owner assigned to Cooke all his interest present and future in the policy of insurance on the life of Moss (subject to the previous mortgage of the policy to Hallet); and Moss and Hallet jointly and severally covenanted with Cooke to pay all premiums and other sums of money which should from time to time become payable for keeping on foot the said policy, and if the policy should become void forthwith to effect a new policy on the life of Moss in the name of Cooke, and to pay all expenses incidental to the effecting of the new policy, and all premiums and other sums of money payable for keeping the same on foot, and in the event of the covenantors failing to effect the same Cooke was at liberty to effect and keep on foot the new policy, and all such money so expended by him was repayable with interest at 10 per cent. on demand by one or both of the covenantors.

On December 13, 1901, by a writing signed by Moss and addressed to Hallet, Moss undertook to take up the mortgage of December 11, 1901, and to pay all principal and interest thereon out of moneys coming to him on the death of his father; and he further undertook, when called upon, to give Hallet a proper legal mortgage upon his interest under the will of his father to secure Hallet against any moneys he might have to pay in respect of his guarantee.

By an indenture dated May 22, 1903, Cooke assigned to one Portal all interest accrued or to accrue due up to and including September 11, 1906, under the indenture of December 11, 1901, and on the same day notice in writing of this assignment was given to Hallet.

On June 18, 1903, Hallet gave notice to Moss to execute a proper legal mortgage in accordance with the undertaking of December 13, 1901. This notice was not complied with.

On November 28, 1903, a receiving order in bankruptcy was made against Moss. At that date the principal sum of 500*l.* remained due under the indenture of December 11, 1901, and the trustee admitted a proof by Cooke for that sum less 100*l.*, which was the amount at which Cooke valued his equity of redemption in the life policy.

Hallet lodged a proof against the debtor's estate, claiming for

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(1.) 687*l.* due under the mortgage of October 24, 1901; (2.) 813*l.*, being his estimated liability in respect of the premiums under his covenant in the indenture of December 11, 1901; and (3.) 600*l.*, being his estimated liability for interest under his covenant in the said indenture less the value of his interest in the policy of insurance.

The trustee admitted the proof as to the first item, but rejected the last two items on the ground that the alleged liability to pay premiums and interest after the date of the receiving order was not provable within the meaning of s. 37 of the Bankruptcy Act, 1883; that Cooke had proved against the estate for the principal debt and had valued the policy of insurance, in respect of which the interest and premiums were respectively payable, and that the appellant, as surety, was not entitled to prove also, and that the claims offended against the rule as to double proof.

The county court judge affirmed the rejection of the proof by the trustee.

Tindale Davis, for the appellant. By reason of the indemnity given to the appellant by the debtor, the appellant is entitled to prove for the estimated value of his liability under his covenant to Cooke to pay the interest on the principal sum secured by the mortgage and to pay the premiums on the policy: Bankruptcy Act, 1883, s. 37, sub-ss. 3, 8; *In re Browne and Wingrove*. (1) With regard to the interest, it is said that the liability of the surety only exists so long as the principal sum remains due, and that by reason of the bankruptcy the principal sum is no longer due. But s. 30, sub-s. 4, of the Bankruptcy Act, 1883, expressly keeps alive the liability of a surety in the event of the bankruptcy of the principal debtor. The county court judge in rejecting the proof ignored the provisions of that section, and treated the bankruptcy as discharging both the principal debtor and the surety. On this point *In re FitzGeorge* (2) is clear authority in the appellant's favour.

[BIGHAM J. That case appears to me to be distinguishable

(1) [1891] 2 Q. B. 574. (2) [1905] 1 K. B. 462.

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from the present case, for there the guarantee was for the payment of interest payable in respect of a debenture "until the repayment" of the principal sum, whereas here the liability of the surety only exists so long "as any principal money remains due." How can it be said that any principal money remains due after the bankruptcy?]

The liability of the debtor is stayed by the receiving order, but the principal money remains due from his estate. Discharge in bankruptcy is not a payment, nor an accord and satisfaction; it only prevents the debtor from being sued. The principal debtor is discharged from liability by operation of law, but the surety remains liable: *In re Jacobs* (1); *In re London Chartered Bank of Australasia* (2); *Stacey* v. *Hill.* (3) With regard to the premiums, the county court judge held that the appellant's proof offended against the rule as to double proof. This is not so. The covenant to keep up the premiums is merely ancillary to the security. All that Cooke, the mortgagee, has proved for is the principal sum of 500*l.* He has not valued the covenant, and the appellant is therefore entitled to prove for the estimated value of his contingent liability, not only to keep up the premiums, but also to pay the cost of taking out a new policy if the first one lapses. [He referred to *Deering* v. *Bank of Ireland.* (4)]

Herbert Jacobs, for the respondent, was not called upon to argue.

BIGHAM J. I am of opinion that this appeal must be dismissed. The first question is whether the appellant can prove against the debtor's estate in bankruptcy in respect of the appellant's covenant to pay Cooke interest so long as any principal money remains due. In my opinion, as soon as the principal debtor became bankrupt, which has happened, it would be untrue to say that the principal money remained due from him to Cooke. The only liability then existing was the liability on the trustee in bankruptcy in administering the bankrupt's estate to pay to Cooke a dividend in respect of

(1) (1875) L. R. 10 Ch. 211.
(2) [1893] 3 Ch. 540, at p. 546.
(3) [1901] 1 K. B. 660.
(4) (1886) 12 App. Cas. 20.

that debt. That being so, my view is that the liability of the appellant to pay interest to Cooke was also gone. It cannot be said that there was still a liability to pay interest if no part of the debt remained due, and if the appellant is not liable to pay interest to Cooke he cannot prove in the bankruptcy.

The deed also contained a covenant by which the appellant and the debtor jointly and severally covenanted with Cooke to pay the premiums necessary to keep up the policy of insurance on the debtor's life. What has happened is that Cooke in proving in the bankruptcy has put a value on his interest in the policy, and has included that value in his proof, and the position, therefore, is just the same as if he had sold the policy to a stranger. It does not make any difference whether Cooke sold the policy or kept it, or whether he decides to pay the premiums himself or to surrender the policy. In any event the liability of the appellant under his covenant is gone.

I think that the county court judge has given the right reasons for disposing of the appellant's contentions on both points. As to the interest, the county court judge in delivering judgment said: "It cannot be possible that while the principal creditor cannot prove and directly obtain dividends in respect of the interest after adjudication he should indirectly have the power of so doing by enforcing his claim against Hallet. The liability of Moss on his covenant to pay the principal sum being provable in the bankruptcy will be discharged when the order of discharge has been granted to him. It would seem a strange conclusion that, the obligation to pay the principal sum being discharged, the liability of Hallet to pay the interest is still to continue. If so, when will this liability cease, unless without any obligation to do so Hallet pays the balance of the principal sum after deducting the dividend received by Cooke? In my judgment, a proof having been made in respect of the principal sum in the bankruptcy, there cannot be another proof for interest springing from the debt already the subject of proof. The principal sum no longer remains payable under the covenant in the deed of December 11, 1901, and in my judgment the liability of Hallet under this covenant has determined." Then in respect of the appellant's liability to pay the premiums

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he said: "The liability to which Moss is subject to Hallet in respect of the payment of the premiums is to indemnify him should he be compelled to pay the same or the damages resulting from the failure to pay the premiums. An implied promise to indemnify is capable of proof within the meaning of s. 37, sub-ss. 3, 8: see *Ex parte Ford.* (1) But Cooke has already proved for the principal debt, after deducting the value of the policy valued at 100*l.* If Hallet can prove on the implied indemnity of Moss in respect of the balance as being the measure of the damages for which he would become liable for the failure to pay the premiums, there clearly would be a double proof in respect of the same sum in substance, although the nature of the liability in each case assumes a different form. This would have been a simple solution of the case but for the right reserved in the deed, on the failure of Moss or Hallet to pay the premiums to Cooke, to pay them to keep the policy on foot and to demand the payment of the sums so paid from either Moss or Hallet. This covenant creates a debt and does not sound in damages, and involved both Hallet and Moss in the liability to pay the premiums until Cooke had received both his principal and interest. If no bankruptcy had intervened, and Hallet had been compelled to pay the premiums, he could have resorted to his remedy against Moss on the implied indemnity. Any right of proof which Hallet may have is in respect of this liability. In my judgment Hallet has no such right of proof. In the first place, if any such right to prove existed, Cooke could have proved in respect of Moss' liability to him under the covenant now under consideration. It was not contended that he could, nor has he attempted to do so. If he cannot, I do not think Hallet can be in a better position. It is contended, however, that the liability to Hallet is quite different to and independent of the liability of Moss to Cooke, and that s. 37 expressly gives Hallet the right to prove. I do not agree. The obligation of Moss to Cooke under his covenant is as much a liability within s. 37 as the liability of Moss to indemnify Hallet. Cooke has valued the policy at 100*l.*, and therefore must be taken to, or be deemed to, have realized his

(1) (1885) 16 Q. B. D. 305.

security. He has proved for the balance of the debt after deducting the value of his security; he cannot have a further proof in respect of the personal covenant of the debtor to pay premiums to maintain the security at its full value for securing this balance: see *Deering* v. *Bank of Ireland.* (1) If Cooke cannot prove so as to make the debtor's estate contribute to keep in force a policy which is already deemed to have been realized, I think that it is impossible that Hallet in respect of his right of indemnity against the debtor can resort to the estate to contribute to the maintenance of this security for the balance already proved, and in respect of which a dividend will be paid, and which will be discharged altogether when the order of discharge is made. Cooke having proved in respect of the balance, Hallet cannot have another proof to indemnify him in respect of his liability to maintain the security for the payment of the same balance. The whole matter can be summed up in a few words. The estate of a bankrupt cannot be called upon to contribute to the maintenance of a security in respect of a debt which is extinguished by the bankruptcy. It must not be overlooked that, if Hallet can prove in respect of the premiums, he will obtain from the estate contribution to the maintenance of the security which he has already valued in his proof for the 700*l.* due to him under the deed of October 24, 1901. I am of opinion that the trustee was right in regard to his rejection of the proof, and I affirm the same, and dismiss this application with costs."

I think that the decision of the county court judge was right on both points, and that this appeal must be dismissed.

DARLING J. I am of the same opinion. I think that this case has been extremely well argued by Mr. Tindale Davis, and we are very much indebted to him for the authorities which he has brought before us; but in my opinion the decision of the county court judge was right. It has been contended with regard to the appellant's liability to pay interest that he had got a debt provable in the bankruptcy. In order to decide that question one must look at the language of the deed. The

(1) 12 App. Cas. 20, at p. 27.

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covenant of the appellant was to pay interest on the principal sum "so long after" the day fixed for payment "as any principal money remains due under these presents." It is clear, therefore, that if no principal money remains due the appellant is under no liability to pay interest to Cooke, and the question therefore is whether after the bankruptcy any principal money did in fact remain due. It is admitted that no action would lie against the bankrupt, but it is argued that the principal money nevertheless remains due even after he has obtained his discharge. Due from whom? It could only be due from the bankrupt, and ex hypothesi he has been discharged from all liability to pay the principal money. In my opinion, money can only be said to be due in a legal sense when it can be recovered in an action, and it is impossible to say that there can be anything due under this security when no money can be recovered by any legal process. If there is no principal money due, it follows that there is no interest payable.

On the other point I agree with what has been said by Bigham J.

Appeal dismissed.

Solicitor for appellant: *Richard Jennings.*
Solicitors for respondent: *Bate & Co.*

F. O. R.

AUSTIN FRIARS STEAM SHIPPING COMPANY, Appellants; STRACK, Respondent. THE SAME, Appellants; STRACK and Others, Respondents.

1905
April 18;
May 29.

Ship — Seaman — Contract of Service for Ordinary Voyage — Carriage of Contraband — Termination of Voyage by Capture — Right to Wages — Damages — Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 158.

A British seaman signed an agreement to serve on a British ship on an ordinary trading voyage to the East, and between ports in the East, to end at a final port of discharge in the United Kingdom. Whilst the ship was in the East war was declared between Russia and Japan, and the ship whilst carrying a cargo of contraband of war was captured by one of the belligerents and confiscated by a Prize Court. The master knew, but the crew did not know, that the ship was carrying contraband. The crew were sent back to London, and suffered hardships on the journey:—

Held, that, as the shipowners had broken the agreement by altering the character of the voyage, the service of the seaman was not terminated "by reason of the loss of the vessel" within the meaning of s. 158 of the Merchant Shipping Act, 1894, when the ship was captured, and that he was entitled to recover his wages up to the date of his arrival in London, and damages for breach of the agreement.

Cases stated by a justice of the peace for the City of London, upon the hearing of two summonses taken out by the respondents, who had been members of the crew of the steamship *Cheltenham*, against the appellants, who had previously been owners of the vessel.

In the first case, the respondent Strack claimed wages alleged to be due to him from the appellants as a seaman on the *Cheltenham*; and, in the second case, the respondents claimed damages for each man for breach of the contract of employment contained in the ship's articles.

The following statement of the material facts detailed in the case is taken from the judgment read by Ridley J. (post), with some slight additions:—

The respondent Strack, on November 24, 1903, signed on the articles of the British steamship *Cheltenham* belonging to the appellants, and then at Bremerhaven, as boatswain at the

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rate of 5*l.* per month, upon an agreement the material part of which was as follows :—

"The several persons . . . . hereby agree to serve on board the said ship . . . . on a voyage from Bremerhaven viâ port in Bristol Channel to Colombo and any ports or places within the limits of 75° N. $\frac{\text{and}}{\text{or}}$ 63° S. latitude trading in any rotation and to the end at a final port of discharge in the United Kingdom or Continent of Europe between the Elbe and Brest inclusive: Period not to exceed two years trading and time to reach the United Kingdom or Continent if vessel so bound direct at end of trading term: If above trading ends from any cause except wreck, or if such time expires while vessel is abroad and not bound direct for United Kingdom or Continent as stated, the crew agree to ship in any other British vessel provided by the master (bound direct for United Kingdom or Continent) at not less than the same rate of wages: It is agreed that when British seamen shipped in the United Kingdom are discharged on the Continent as above, the master shall furnish the means of sending them back (with maintenance) to the nearest port in the United Kingdom served by regular steamers, and the crew agree to such port as the port in the United Kingdom to which they may be so sent back. The crew further agree at master's option to proceed from the port of final discharge as above to a port in the United Kingdom for loading or otherwise." The other respondents signed the same agreement.

The *Cheltenham* left Bremerhaven on November 25, 1903, loaded a cargo of coals at Barry, and arrived at Colombo on January 10, 1904. She proceeded thence to Rangoon, where she arrived on January 26, 1904, and loaded a cargo of rice for Yokohama, with which she sailed on February 9, 1904, and arrived at Yokohama on March 7, 1904. Early in February, 1904, war was declared between Russia and Japan, and on the 12th of that month a Royal Proclamation of the fact appeared in the *London Gazette*. On February 19, March 1, March 18 and 22, there appeared also in the *Gazette* various notices as to contraband of war.

On March 11, 1904, the *Cheltenham* was chartered by the

appellants to contractors for the Chemulpho Railway Company for six months, to be employed in trading between certain ports in Japan and Korea in such lawful trades as the charterers or their agents should direct. She made several voyages accordingly carrying railway material, which had been declared contraband of war by both Japan and Russia. While at Yokohama, between March 7 and 19, Strack endeavoured to obtain information as to what was contraband of war from the German consul, but received no answer; and he did not know, nor did any of the crew, that the cargoes to be carried were contraband of war. The master of the ship, however, the agent of the appellants, did know that such cargoes were contraband, but he did not tell the crew.

On July 2, 1904, while proceeding on the last of these voyages, the *Cheltenham* was captured by a Russian gunboat and taken as prize of war to Vladivostok, where, on July 7, she and her cargo were confiscated by a Prize Court. The appellants did not appeal from this decision.

There being no vessel at Vladivostok in which the crew could proceed home, the captain applied at once to the proper authority to have them sent home viâ St. Petersburg. This was arranged, and on July 29 he and the crew left by the Trans-Siberian Railway and arrived at St. Petersburg on August 18. On the 23rd they left that place, and arrived by steamer in London on August 30, 1904. Travelling expenses and maintenance during the journey were found partly by the appellants and partly by the Russian Government. The respondents suffered hardships during their journey from Vladivostok to St. Petersburg and at St. Petersburg, owing to bad accommodation and the difficulty of obtaining sufficient food. At St. Petersburg Strack was offered his wages up to July 2, 1904, the date of the capture; but this was refused. He was afterwards offered his wages up to August 30, 1904, the date of his arrival in London; but this offer was also refused by Strack, who said he should claim damages for breach of contract contained in the ship's articles.

An account of wages up to August 30, 1904, was made up and given to Strack in accordance with s. 132 of the Merchant

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Shipping Act, 1894 (57 & 58 Vict. c. 60), and it shewed a balance due of 35*l.* 2*s.* 2*d.*

On September 1, 1904, Strack and other members of the crew issued a summons under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), as amended by the Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), s. 11, claiming damages against the appellants for breach of the agreement contained in the ship's articles; and upon this summons the magistrate awarded 10*l.* damages to Strack and to each of the crew.

On September 10, 1904, Strack took out a summons under s. 164 of the Merchant Shipping Act, 1894, claiming the sum of 35*l.* 2*s.* 2*d.* for balance of wages due up to August 30, and for continuing wages up to the date of final settlement under s. 134 of that Act. At the hearing on September 16 the appellants admitted the claim up to July 2, and the special case stated that the summons was adjourned for the claim to be amended. The appellants then paid the wages due up to July 2, 1904; and on the further hearing on September 17 the magistrate gave judgment for the balance remaining due for wages between the two dates—July 2, 1904, and August 30, 1904—namely, 9*l.* 13*s.* 4*d.*, and costs; but he declined to allow a claim for anything after August 30 on the ground that there was then a bonâ fide dispute within the meaning of s. 134.

The questions for the opinion of the Court were: (1.) whether the magistrate was right in holding that the appellants had committed a breach of contract, and that the respondents were entitled to recover damages; and (2.) whether he was right in holding that the respondent Strack was entitled to wages up to August 30, 1904.

Scrutton, K.C., and *Dawson Miller*, for the appellants. The questions in these cases are governed by s. 158 of the Merchant Shipping Act, 1894. (1) There was a "loss" of the ship,

(1) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 158: "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided

within the meaning of that section, when she was captured, and therefore the seaman was not entitled to wages after the date of the capture, and there was no breach of the agreement for which he could claim damages. "Loss" in that section is distinguished from "wreck," and includes anything which happens to remove the vessel from the possession of the owner and frustrate the adventure. The carrying of contraband is not illegal: *Ex parte Chavasse, In re Grazebrook* (1); and, therefore, the loss of the ship was not brought about by any wilful illegal act of the shipowners. This voyage was in accordance with the agreement, and the carrying of contraband was a lawful trade. The case of *The Justitia* (2) is clearly distinguishable, for there the voyage was altogether different from that contemplated, and there was a clear breach of the agreement.

Robson, K.C., and *Pilcher*, for the respondents. The question whether the carrying of contraband is illegal or not is immaterial. This was an agreement of service for an ordinary commercial venture, and the employers had no right to take the seamen on a voyage which was entirely beyond the scope of the agreed voyage and involved greater risks and perils. By doing so the employers committed a breach of the agreement and became liable to pay damages: *The Justitia* (2); and also to pay the seamen their wages up to the time when they arrived back in London, which would have been the termination of the voyage in the ordinary course: *Burton* v. *Pinkerton* (3); *O'Neil* v. *Armstrong, Mitchell & Co.* (4) Capture while carrying contraband is not a "loss" within the meaning of s. 158; but even if it were a "loss," the shipowners cannot excuse themselves on that ground when the service has been terminated owing to their own act.

Dawson Miller replied.

Cur. adv. vult.

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by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

(1) (1865) 34 L. J. (Bank.) 17.
(2) (1887) 12 P. D. 145.
(3) (1867) L. R. 2 Ex. 340.
(4) [1895] 2 Q. B. 70, 418.

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May 29. The judgment of the Court (Kennedy and Ridley JJ.) was read by

RIDLEY J. These were two cases stated for the opinion of the Court by a justice of the peace for the City of London, the first relating to a claim for wages made by a seaman under the Merchant Shipping Act, 1894, and the latter to a claim for damages in respect of the same employment made by him and others under the Employers and Workmen Act, 1875, as amended by 43 & 44 Vict. c. 16, s. 11. [The facts found in the case were here stated.]

It was argued for the appellants that the ship, when she was taken, was "lost" within the meaning of s. 158 of the Merchant Shipping Act, 1894, and that Strack was, therefore, entitled to wages only up to that date—that is to say, July 2, 1904. By that section, "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, ... he shall be entitled to wages up to the time of such termination, but not for any longer period." It seems to us very doubtful whether the word "loss" would in any case include a capture such as this, which is not in the same category as wreck, fire, or stranding, or such terminations of a voyage as are brought about by the perils of the seas. But, however that may be, it seems clear that the section was not intended to include cases where the service terminates, not owing to capture by the King's enemies, but from the wilful action of the captain and owners, and not resulting either directly or indirectly from any peril or hurt affecting the ship itself or preventing the continuance of the voyage. The case of *O'Neil* v. *Armstrong, Mitchell & Co.* (1) was referred to on the argument, and appears to us to have a decided bearing upon the question before us. In that case the plaintiff shipped as fireman on a torpedo-boat, constructed for the Japanese Government by the defendants, for a voyage to Yokohama. The ship left the Tyne on July 31, 1894, and war was declared between China and Japan on August 3. The plaintiff became aware of this, and

(1) [1895] 2 Q. B. 70, 418.

at Aden, after a proclamation had been read on board warning the crew against any breach of the Foreign Enlistment Act, 1870, he and his fellow-sailors left the ship and were sent home by the Board of Trade. The plaintiff sued for balance of wages and for damages for non-fulfilment of the contract. The nominal defendants accepted responsibility for the satisfaction of the plaintiff's claim to the extent of the liability, if any, of the captain of the vessel. It was held in the Queen's Bench Division and in the Court of Appeal that the plaintiff was entitled to recover both wages and damages, inasmuch as the defendants admitted responsibility for the captain of a vessel whose owners (represented for the purposes of the action by the defendants) had by the declaration of war altered the character of the voyage during its continuance, and exposed the plaintiff and crew to dangers greater and other than those originally anticipated. It was not a case in which something had occurred beyond the control of either party (such as was *Appleby* v. *Meyers* (1)) by which the voyage had been terminated, but a case in which its continuance resulted directly from the action of the owners. There the risk was altered because after the outbreak of hostilities the Japanese vessel of war became liable to capture by the enemy, and for that outbreak of hostilities the owners were liable. In the present case the risk was altered because after the outbreak of hostilities between Japan and Russia the captain, acting for and as agent for the owners, and therefore the owners, undertook a venture materially different from the character of the voyage in regard to which the seaman's contract was made. They knew (although the crew did not) that railway material had been declared to be contraband when they chartered the vessel for the voyages, on one of which she was seized and captured: see *Burton* v. *Pinkerton*. (2) It is true that the carrying of contraband is not illegal: *Ex parte Chavasse, In re Grazebrook* (3), but merely exposes the neutral who engages in such a venture to the risk of seizure and confiscation; but the question does not turn upon the legality or illegality of the voyage and its object,

(1) (1866) L. R. 1 C. P. 615; 2 C. P. 651.

(2) L. R. 2 Ex. 340.

(3) 34 L. J. (Bank.) 17.

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Ridley J.

but upon whether, after its inception, the risk and danger is materially varied by any alteration in its conditions for which the owners are responsible. It seems clear that, when the owners engaged in carrying cargo which they knew to be contraband, they did so alter the condition of the voyage. That was the cause of its termination, and not a "loss" of the ship, within the meaning of s. 158 of the Merchant Shipping Act. In *O'Neil* v. *Armstrong, Mitchell & Co.* (1) the plaintiff was entitled by the articles to the lump sum of 30*l.* on arriving at Yokohama, and having received a portion of that sum on account the Court gave him judgment for the balance. Upon this contract Strack was entitled to be paid at the rate of 5*l.* a month till his arrival in the United Kingdom—that is to say, August 30. We are of opinion that the magistrate's decision in awarding the balance due up to that date was right. In regard to damages, there was jurisdiction, in the view which we have already expressed as to the breach of contract, to award damages: see *The Justitia* (2); and we see no reason, considering the hardships involved in the homeward journey of the crew, in holding that the amount awarded in the present case is in point of amount unreasonable.

Judgment for the respondents.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Pattinson & Brewer.*

(1) [1895] 2 Q. B. 70, 418. (2) 12 P. D. 145.

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1905
May 25;
June 2.

ATTORNEY-GENERAL *v.* SIR WROTH PERIAM LETHBRIDGE (Bart.).

Revenue—Estate Duty—Policy of Life Insurance—Interest provided by the Deceased—Family Arrangement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*d*); *s.* 3.

The equitable tenant for life of an estate had raised on the security of his life estate and of certain policies of insurance on his life sums amounting to 59,121*l.* By an arrangement made between him and the defendant, his son, who was equitable tenant in tail in remainder, the estate was disentailed, and the sum of 71,000*l.* was raised on mortgage of the fee, out of which the mortgages for 59,121*l.* were paid off. As a further part of the same arrangement, the policies, having been reassigned to the tenant for life, were by him assigned to the defendant, and the estate was resettled upon trust (inter alia) out of the rents and profits to pay the interest on the mortgage debt of 71,000*l.*, and the premiums necessary for keeping on foot the policies, but, in case of any of the policies being surrendered by the defendant, then to pay the amount that would otherwise have been payable as a premium in respect of it to the defendant, and to apply the residue of the rents and profits in paying to the defendant the sum of 1000*l.* a year, and, subject to the trusts aforesaid, in trust for the tenant for life with remainder on his decease to the defendant in fee. Subsequently, in consideration of the sum of 4100*l.* paid to him, the tenant for life assigned (by way of surrender) his life estate to the defendant; but the assignment was expressed to be subject to the trust for keeping on foot the policies, and the amount of the price paid to the tenant for life was calculated on the footing that the life estate was subject to that trust. The policies were kept up under the before-mentioned trust, and, on the death of the tenant for life, the defendant received the policy moneys. On an information by the Crown claiming estate duty on the amount of these moneys:—

Held, reversing the judgment of Phillimore J., that they were interests provided by the deceased within the meaning of the Finance Act, 1894, s. 2, sub-s. 1 (*d*), and therefore estate duty was payable by the defendant on them.

Appeal from the judgment of Phillimore J. on an information by the Attorney-General claiming that on the death of Sir Wroth Acland Lethbridge estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value received under certain policies of insurance.

C. A. 1905

ATTORNEY-GENERAL v. LETHBRIDGE.

Under the will of Sir Thomas Lethbridge (the grandfather of Sir Wroth Acland Lethbridge) and other assurances certain estates were vested in trustees upon trust for the payment of certain annuities and, subject thereto, upon trust to pay the income thereof to Sir Wroth Acland Lethbridge for life, and after his death in trust for the defendant in tail male with equitable remainders over.

At the date of the indenture next hereafter mentioned Sir Wroth Acland Lethbridge had raised by way of charge upon his life estate and sundry policies of insurance on his life (including the fifteen policies hereinafter mentioned) sums amounting to 59,121*l.*

By an indenture dated March 4, 1885, and made between Sir Wroth Acland Lethbridge of the first part, the defendant of the second part, and Charles Rankin Vickerman Longbourne of the third part, which indenture was executed as part of a family arrangement between Sir Wroth Acland Lethbridge and the defendant, and was duly enrolled as a disentailing assurance on March 6, 1885, the estates were limited to Charles Rankin Vickerman Longbourne and his heirs subject to the several annuities, mortgages, and incumbrances affecting the same, but freed and discharged from the estate in tail male of the defendant and the remainders thereon, upon such trusts as Sir Wroth Acland Lethbridge and the defendant should by deed jointly appoint, and in default of appointment upon the trusts therein referred to (being the trusts subsisting under the will of Sir Thomas Lethbridge).

As a further part of the family arrangement, and by an indenture dated June 10, 1885, and made between Sir Wroth Acland Lethbridge and the defendant of the first part, Ambrose Lethbridge and others of the second part, and Sir William Frederick Pollock and others of the third part, Sir Wroth Acland Lethbridge and the defendant, in consideration of 71,000*l.* paid to them, appointed and conveyed certain portions of the estate to Sir William Frederick Pollock and others by way of mortgage for securing the said sum of 71,000*l.* and interest. The said sums, amounting to 59,121*l.*, charged on the life estate of Sir Wroth Acland Lethbridge and on the

said policies of insurance, were paid off out of the said sum of 71,000*l.*, and the said several policies on the life of Sir Wroth Acland Lethbridge, including the fifteen policies, were re-assigned to Sir Wroth Acland Lethbridge. It was further part of the family arrangement that the fifteen policies of insurance should thenceforth be kept up out of the rents of the estates, and that the policies should be assigned to the defendant absolutely.

By an indenture dated August 19, 1885, and made between Sir Wroth Acland Lethbridge and the defendant of the first part, Ambrose Lethbridge and others of the second part, Thomas Yate Benyon of the third part, and Thomas Yate Benyon and Charles Rankin Vickerman Longbourne of the fourth part, the estates were, subject to certain rent-charges and to the indenture of June 10, 1885, appointed and granted to Thomas Yate Benyon and his heirs to the use of the said Thomas Yate Benyon, his executors, administrators, and assigns, during the life of Sir Wroth Acland Lethbridge upon trust for the management of the estates as therein mentioned, and out of the rents to pay expenses of the management, the said rent-charges and annuities, and the interest on the mortgage debt of 71,000*l.*, and in the next place to pay the annual premiums and other sums which were then and from time to time should be necessary for keeping on foot the said policies of insurance specified in the schedule thereto, and any policy or policies effected as thereinafter mentioned, or for restoring the same respectively if the same respectively should become voidable, and in case the said policies or any of them should become void to effect a new policy or policies to be delivered to the defendant, his executors, administrators, or assigns, with such office or offices as he or they should direct, and in his or their name or names, on the life of Sir Wroth Acland Lethbridge in such sum or sums as should amount to the sum or sums which would have been payable under the policy or policies so become void if Sir Wroth Acland Lethbridge had then died, but so that, in case any such policy or policies should during the life of Sir Wroth Acland Lethbridge be surrendered by the defendant to the office granting the same,

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and the annual premium or premiums payable in respect thereof should in consequence cease to be payable, the amount of such premium or premiums should not cease to be raiseable, but should be raised and paid to the defendant; and to apply the residue of the said rents and profits as therein mentioned, that is to say, in the next place to pay to the defendant the sum of 1000*l.* a year, and, subject to the trusts aforesaid, the premises thereby appointed and granted were to be in trust for Sir Wroth Acland Lethbridge as tenant for life with remainder to the use of the defendant, his heirs and assigns. By an indenture also dated August 19, 1885, and made between Sir Wroth Acland Lethbridge and the defendant, after reciting the before-mentioned facts, it was witnessed that in further pursuance of the said family arrangement and in consideration thereof Sir Wroth Acland Lethbridge, as beneficial owner, assigned to the defendant, his executors, administrators, and assigns, all those fifteen policies of insurance on the life of Sir Wroth Acland Lethbridge specified in the schedule to the indenture, and all moneys to become payable thereunder, to hold the same to the defendant, his executors, administrators, and assigns, for his and their own benefit.

The amount of the fifteen policies in question, which had been taken out at various dates between February, 1856, and December, 1872, was 26,500*l.*, and the annual premiums payable in respect thereof at the date of the said indenture of August 19, 1885, amounted to 864*l.* Bonuses to the amount of 3567*l.* 4*s.* 2*d.* had been declared on the policies prior to June, 1885.

The defendant, by indentures dated November 1, 1892, November 13, 1893, February 25, 1895, December 7, 1896, June 1, 1898, and October 24, 1899, mortgaged the policies to secure moneys advanced to him. The said mortgages contained no covenant by the defendant himself to keep up the policies, but the defendant assigned to the several mortgagees the benefit of the provisions for keeping up the same contained in the indenture of settlement of August 19, 1885. Thus by the indenture of October 24, 1899, made between the defendant of the one part and W. J. Trevelyan of the other part, reciting

that the defendant was entitled to the policies specified in the schedule thereto (being seven of the fifteen policies), and was entitled to the benefit of the provisions contained in the indenture of August 19, 1885, for keeping on foot the same or any new policies in lieu thereof, the defendant, in consideration of 3000*l.* advanced to him, covenanted for the repayment of the sum so advanced with interest, and assigned to the said W. J. Trevelyan the said seven policies of insurance, together with the full benefit of the provision for keeping on foot the same policies contained in the indenture of settlement of August 19, 1885.

By an indenture dated September 8, 1898, in consideration of 4100*l.*, Sir Wroth Acland Lethbridge assigned (by way of surrender) to the defendant his life interest in the estates comprised in the indenture of August 19, 1885 (subject, inter alia, to the indenture of mortgage of June 10, 1885, and to the trusts by the indenture of August 19, 1885, declared for keeping on foot the said fifteen policies, so far as was necessary for the security or protection of the respective mortgagees of the policies, but discharged from the other trusts thereby declared for Sir Wroth Acland Lethbridge and his assigns), to hold unto and to the use of the defendant, his heirs and assigns, during the life of Sir Wroth Acland Lethbridge, to the intent that the life estate might merge in the reversion. The purchase-money of 4100*l.* was calculated on the footing that the defendant was entitled under the provisions contained in the settlement to have the premiums on all the policies during the life of Sir Wroth Acland Lethbridge paid out of the rents and profits of the estates. The mortgages by the defendant of the fifteen policies continued until January 8, 1902, when the defendant paid off the same, and by an indenture of January 9, 1902, he again mortgaged the same policies, covenanting in the new mortgage to pay the premiums.

Sir Wroth Acland Lethbridge died on November 26, 1902. All the moneys (including bonuses) secured by the fifteen policies then became payable, and have been duly paid or accounted for to the defendant. No premium in respect of five of the policies fell due or was paid after January 8, 1902.

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In respect of each of the remaining ten policies the defendant himself paid one premium under his covenant.

The information claimed that, in these circumstances, estate duty under the provisions of the Finance Act, 1894, ss. 1 and 2, sub-s. 1 (*c*), and s. 2, sub-s. 1 (*d*), or one or more of those sections became payable in respect of the moneys received under all the said policies of insurance, or, alternatively, in respect of such moneys, less a sum in proportion to the premium paid in respect of any of the policies after January 8, 1902, or, alternatively, on the moneys received under the said policies in respect of which no premium had been paid after January 8, 1902. The defendant contended that no estate duty was payable in respect of the moneys received under any of the policies.

By s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, property passing on the death of the deceased is deemed to include "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Phillimore J. was of opinion that the effect of the family arrangement was, in substance, that, in consideration of the defendant's agreeing to disentail the estate, and to its being charged with the mortgage debt of 71,000*l.*, the deceased assigned the policies of insurance on his life to the defendant, and also agreed to his receiving out of the estate an income of 1000*l.* a year, and, in effect, the amount of the premiums which would be necessary to keep on foot the policies; and therefore the policies must be regarded as having been kept on foot by the defendant, and not by the deceased. He held therefore that the policy moneys had not been "provided by the deceased" within the meaning of the Finance Act, 1894, s. 2, sub-s. 1 (*d*), and consequently the defendant was not liable to pay the estate duty claimed by the Crown.

Sir R. B. Finlay, *A.-G.*, and *Sir E. H. Carson S.-G.* (*Vaughan Hawkins* with them), for the Crown. It was held in

Attorney-General v. *Murray* (1) that the expression "interest" in s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, covers money payable under a policy of insurance on the life of the deceased. The question is whether the policy moneys in this case were interests "purchased or provided" by the deceased, either by himself alone, or in concert or by arrangement with any other person within the meaning of the sub-section. It is submitted that they were provided by the deceased either by himself alone, or by arrangement between himself and the defendant. It has been suggested that the policies were really provided by the defendant from the moment of the resettlement of August 19, 1885; that, the substance of the arrangement then made being that, in consideration of the defendant's joining in the resettlement, so that the sum of 71,000*l.* might be raised, the tenant for life agreed that the defendant should receive out of the rents and profits of the estate 1000*l.* a year and the amount of the premiums which would be necessary to keep up the policies, they may be said to have been subsequently provided by the defendant out of his own funds. Great stress was laid, in support of this contention, on the provision that, if a policy were surrendered, the money that would otherwise have been payable in order to keep it up should be paid to the defendant. But the fact that, in an event which did not happen, this money would become payable to the defendant, and the policy would not then be provided by the deceased, does not make it any the less the fact that the policy was provided by the deceased in the event which did happen, namely, that the policy was kept on foot. The funds for keeping up the policies came out of the deceased's life estate by virtue of the trust created for that purpose. The arrangement between the deceased and the defendant for the resettlement of the estate was clearly an arrangement within the sub-section. Assuming that the defendant may be said to have given consideration by joining in the resettlement, that is immaterial, inasmuch as the transaction was not a purchase by him within s. 3 of the Finance Act, 1894. The subsequent purchase of the life

(1) [1904] 1 K. B. 165.

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interest of the deceased by the defendant makes no difference, for the trust for payment of the premiums on the policies was preserved, and, for the purposes of the sub-section, the substance of the transaction, and not the technical doctrine of merger, must be regarded. The substance of the transaction was that the money for the premiums was still provided out of the life estate, for the existence of the trust to pay the premiums was taken into consideration in fixing the price which the defendant paid.

[They also cited *Attorney-General* v. *Hawkins* (1); *Lord Advocate* v. *Earl of Fife* (2); *Lord Advocate* v. *Fleming* (3); *Attorney-General* v. *Beech.* (4)]

Montague Lush, *K.C.*, and *A. àB. Terrell*, for the defendant. It is submitted that, whether the substance or the form of the transaction be looked at, it is impossible to say that the deceased provided these policies. In 1898 the remainder was accelerated and came into possession, and the life interest of the deceased was merged. The policy moneys did not become payable until 1902. After 1898 it could not be said that the premiums were paid out of the life estate. The moneys out of which the premiums were paid were substantially the defendant's. The defendant really had the control of those moneys all along, because he was entitled to surrender the policies at any time, and then the money which would otherwise have been paid for premiums would have become payable to him. The money was therefore in substance payable to him, whether the policies were kept up or not. It was for him to say whether he preferred the money invested in the policies or in some other mode of investment. It cannot be said that it was from the deceased's bounty down to his death that the policy moneys were provided at the date of his death. The transaction amounted to a purchase within s. 3 of the Finance Act, 1894, because the defendant was a loser upon the figures. It was really a sale by the father of the amount necessary to keep the policies alive.

The ten policies upon which the last premium was paid by

(1) [1901] 1 K. B. 285.
(2) (1883) 11 R. 222.
(3) [1897] A. C. 145.
(4) [1899] A. C. 53.

the defendant cannot be said to have been provided by the deceased at the date of his death.

Sir R. B. Finlay, A.-G., in reply.

Cur. adv. vult.

June 2. The judgment of the Court (Collins M.R., Mathew L.J., and Cozens-Hardy L.J.) was read by

COZENS-HARDY L.J. This is an appeal by the Attorney-General from a judgment of Phillimore J. dismissing an information which claimed estate duty as payable on certain policy moneys under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894.

In 1885 Sir Wroth Acland Lethbridge, the late baronet, hereinafter called the father, was equitable tenant for life of the Lethbridge estates, and his son, the defendant, the present baronet, was equitable tenant in tail. The father had raised 59,121*l.* upon the security of his life interest and of fifteen policies on his life for 26,500*l.*, on which bonuses to the amount of 3567*l.* 4*s.* 2*d.* had been declared. A family arrangement was entered into by virtue of which (1.) the estate tail was barred, and the son became equitable tenant in fee simple in remainder after his father's death; (2.) a sum of 71,000*l.* was raised on the security of the fee simple; (3.) out of the 71,000*l.* the charges on the father's life interest and on the policies were paid off; (4.) 1000*l.* a year was provided for the son during the joint lives of the father and the son out of the father's life interest; (5.) the policies were assigned to the son absolutely; and (6.) provision was made for payment of the premiums on the policies. Of these various transactions the last is the only one to which attention need be called in detail. It is part of the provisions of the settlement or resettlement dated August 19, 1885. The father's life interest was vested in trustees upon trust out of the net rents and profits to pay the interest on the mortgage debt of 71,000*l.*, and in the next place to "pay the annual premiums and other sums which are now or from time to time shall be necessary for keeping on foot" the fifteen policies, "or for restoring the same respectively if the same respectively shall become voidable, and in case" the fifteen

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policies "or any of them or any policy or policies effected as hereinafter mentioned shall become void effect a new policy or policies of assurance, to be delivered to" the son, his executors, administrators, or assigns, with such office or offices as the son, his executors, administrators, or assigns should direct, and in his or their name or names, on the life of the father in such sum or sums of money as should be or amount to the sum or sums which would have been payable under the policy or policies so become void if the father had then died, but so that in case any such policy or policies should during the life of the father be surrendered by the son, his executors, administrators, or assigns, to the office or offices granting the same, and the annual premium or premiums payable in respect thereof should in consequence cease to be payable to such office or offices respectively, the amount of the premium or premiums which would have been payable in respect of such surrendered policy or policies respectively in case the same had not been so surrendered should not cease to be raiseable under the present trust, but should be raised in the same manner in all respects as if such policy or policies had continued in force, and should be paid to the son, his executors, administrators, and assigns. Subject as above, the trust was for payment to the son of 1000*l.* a year during the joint lives and then for the father and his assigns.

The first question that arises is whether under this transaction the fifteen policies were an "interest purchased or provided" by the father, either by himself alone, or in concert or by arrangement with the son, within the meaning of s. 2, sub-s. 1 (*d*). It has been held by this Court that a policy may fall within this clause: *Attorney-General* v. *Murray*. (1) And in our opinion the fifteen policies were "provided" by the father by arrangement with the son by means of the application of part of his income in paying the premiums which kept the policies alive. Phillimore J. seems to have held that this elaborate arrangement was nothing more than a trust to pay to the son, or for his sole benefit, an annual sum of 864*l.* (the amount of the then premiums) plus 1000*l.* a year, but we

(1) [1904] 1 K. B. 165.

cannot adopt this view. In one event only could the son claim to be paid the 864*l.*—namely, in the event of his electing to surrender the policies. Moreover, the 864*l.* was not a fixed charge upon the father's income. It might be increased if a fresh policy had to be effected. It would be reduced whenever a bonus was declared, for the son could not call upon the trustees to apply out of the father's income anything more than the premiums "necessary for keeping on foot" the policies. But however that may be, we think that, if nothing else had happened and the policies had been kept up under the trust of 1885 until the father's death in November, 1902, the case would clearly have fallen within sub-s. 1 (*d*).

It was urged that the policies were really purchased by the son, and therefore were exempt from estate duty. But the language of s. 3 does not justify this argument. A family arrangement of the nature above described is not "a bonâ fide purchase" "for full consideration in money or money's worth"; and the transactions of 1885 were, both in form and in fact, a family arrangement, although there was ample consideration on each side.

It remains to consider whether the subsequent dealings of the father and son have materially altered the position. (*a*) The son mortgaged the policies by six deeds, in each of which he assigned the benefit of the provisions for keeping up the policies contained in the settlement of 1885, but without any personal covenant for payment of the premiums. This left the position unchanged. (*b*) In September, 1898, the son purchased his father's life interest for 4100*l.* The father surrendered his life interest to the son to the intent that the life interest might merge in the reversion. But the surrender was subject (inter alia) to the trusts for keeping on foot the policies so far as was necessary for the security or protection of the respective mortgagees. (*c*) In October, 1899, the defendant mortgaged the policies with the full benefit of the provisions for keeping on foot the policies. This is remarkable as indicating an intention to keep alive the trust, in spite of his being then the absolute owner of the Lethbridge estates. (*d*) In January, 1902, the defendant paid off the mortgages of

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the policies and again mortgaged them, but without assigning the benefit of the provisions for keeping on foot the policies; and he covenanted in the usual way to pay the premiums. No premium fell due or was paid on five out of the fifteen policies after the date of this mortgage, the father having died in November, 1902. The result is that these five policies were kept on foot solely by virtue of the trust in the settlement of 1885, and we think that they clearly fall within sub-s. 1 (*d*).

With regard to the remaining ten policies there is rather more difficulty, inasmuch as one premium was paid by the defendant pursuant to his covenant, although with that exception they were likewise kept on foot by virtue of the trust. Upon the whole, however, we think that they were "provided" by the father, a part of whose income was appropriated for the purpose of keeping them on foot. The merger of the life interest in the son's reversion did not substantially affect this. The son never ceased during his father's life to have the benefit of this appropriated fund, and when he purchased his father's life interest the price paid was calculated on the footing that this prior trust was subsisting. The circumstance that the last premium was not paid through the hands of the trustees, but directly by the son, does not suffice to alter the nature or effect of the provision made by the father and retained by the son. In our opinion, therefore, this appeal ought to be allowed, and estate duty must be paid on the full amount received in respect of all the fifteen policies.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Tomlin & Chitty.*

E. L.

[CROWN CASE RESERVED.]

1905
March 18.

THE KING *v.* CHANDRA DHARMA.
THE KING *v.* HUTCHINSON.
THE KING *v.* SLATER.
THE KING *v.* COURT.

Criminal Law—Carnally knowing Girl above Thirteen and under Sixteen—Limitation of Time for taking Proceedings—Extension of Time—Retrospective Effect of Statute—Procedure—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 5—*Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 27.

The prisoner was convicted, under s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885, of an offence committed on July 15, 1904. The prosecution was not commenced until December 27, more than three months but less than six months after the commission of the offence. On October 1 the Prevention of Cruelty to Children Act, 1904, came into operation, by s. 27 of which the time for commencing a prosecution for an offence under s. 5, sub-s. 1, of the earlier Act was extended from three months to six months :—

Held, that s. 27 related to procedure only, and was therefore retrospective, and that the conviction must be upheld.

CASE stated by Mr. Commissioner Rentoul, K.C.

The prisoner Chandra Dharma was tried at the Central Criminal Court at the January Sessions, 1905, on the first count of an indictment charging him with unlawfully and carnally knowing a girl named Grace Killen upon July 15, 1904, when she was above the age of thirteen years and under the age of sixteen years—to wit, of the age of fourteen years and eleven months—contrary to the provisions of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5 (1), as amended by the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), s. 27.

The said count of the indictment was as follows : "Central Criminal Court to wit. The jurors for Our Lord the King upon their oath present that Chandra Dharma on the fifteenth day of July in the year of our Lord nineteen hundred and four at the parish of Clapham in the county of London and within

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the jurisdiction of the said Court in and upon one Grace Killen a girl above the age of thirteen years and under the age of sixteen years—to wit, of the age of fourteen years and eleven months—unlawfully did make an assault and her the said Grace Killen did then unlawfully and carnally know against the form of the statute, &c."

The prisoner was charged at the police court on December 27, 1904, and a warrant was granted upon that date.

It was contended that the prisoner ought not to be convicted on the ground that, by the proviso to s. 5 of the Criminal Law Amendment Act, 1885, no prosecution could be commenced for an offence under sub-s. 1 of that section more than three months after the commission of the offence, and that the prosecution had been commenced on December 27, 1904, more than three months after the commission of the offence on July 15, 1904; and, further, that although by s. 27 of the Prevention of Cruelty to Children Act, 1904, the limit of time mentioned in the proviso to s. 5 of the Criminal Law Amendment Act, 1885, was to be six months after the commission of the offence, the latter Act did not receive the Royal assent until August 15, 1904, and by s. 33, sub-s. 3, of the Act did not come into operation until October 1, 1904, both of such dates being subsequent to the date of the offence charged, and that s. 27 of the Prevention of Cruelty to Children Act, 1904, was not retrospective.

The Commissioner overruled the objection, and the prisoner was convicted.

THE KING *v.* HUTCHINSON.
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A similar point was raised in each of these three cases, stated by Phillimore J., Mr. Commissioner Hammond Chambers, K.C., and Channell J. respectively.

In all the cases the date on which the Act came into operation—October 1, 1904—was less than three months from the date of the commission of the offence.

The question for the opinion of the Court in all the cases

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was whether s. 27 of the Prevention of Cruelty to Children Act, 1904, was retrospective. (1)

Compton-Smith, for the prisoner Chandra Dharma. Where a section is ambiguous it must be interpreted in favour of the prisoner. Sect. 27 of the Prevention of Cruelty to Children Act, 1904, in extending the time within which proceedings for offences created by s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885, must be taken, does not assume to affect offences which had been committed before the Act came into operation. By implication it repealed s. 5, sub-s. 1, and re-enacted it: *Michell* v. *Brown*. (2) Until October 1, 1904, the Criminal Law Amendment Act, 1885, governed all offences committed up to that date (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 11). In criminal cases to even a greater extent than in civil cases, if two constructions of a section are possible, the Court is bound to take that construction which is most in favour of the defendant. In *Tuck* v. *Priester* (3) Lord Esher M.R. said: "If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." In *Reg.* v. *Griffiths* (4) Lord Coleridge C.J. said: "It seems to me a very strong thing to hold that a defence which was open to a man at the time he did the acts complained of has been taken away

(1) By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5, "Any person who

"(1.) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years . . . . shall be guilty of a misdemeanour . . . . Provided . . . . that no prosecution shall be commenced for an offence under sub-section one of this section more than three months after the commission of the offence."

By the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15)—which received the Royal assent on August 15, 1904—s. 27, "The limit of time mentioned in the second proviso of s. 5 of the Criminal Law Amendment Act, 1885, shall be six months after the commission of the offence."

By s. 33, sub-s. 3, "This Act shall come into operation on the first day of October, 1904."

(2) (1858) 1 E. & E. 267.

(3) (1887) 19 Q. B. D. 629, at p. 638.

(4) [1891] 2 Q. B. 145, at p. 148.

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by the retrospective operation of a subsequent statute." Here to hold that s. 27 is retrospective will take away the defence that was open to the prisoner—namely, that proceedings had not been taken within three months of the offence. It therefore puts him in a worse position than he was when the act complained of was committed: Bacon's Maxims, Reg. 8.

McCardie, for the defendants Hutchinson and Slater, referred to *In re School Board Election for Parish of Pulborough* (1); Maxwell on the Interpretation of Statutes, 3rd ed. pp. 298 et seq.

G. M. Gathorne Hardy, for the defendant Court.

Arthur Hutton and *H. C. Dickens*, for the prosecution in Chandra Dharma's case and Court's case respectively, were not called upon to argue.

No counsel appeared for the prosecution in Hutchinson's or Slater's cases.

LORD ALVERSTONE C.J. We have none of us any doubt that the view taken by the Court in each of these cases was the correct one. The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective (2), and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr. Compton-Smith would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This

(1) [1894] 1 Q. B. 725. (2) *The Ydun*, [1899] P. 236.

statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective. The convictions in all these cases must be affirmed.

LAWRANCE J. I agree.

KENNEDY J. I agree.

CHANNELL J. I agree; but I wish to say that in my view a statute dealing only with procedure applies to past events as well as to future events, and to hold this is not to make the statute retrospective. The object of the statute is only to affect the procedure, and it matters not whether the events in respect of which the proceedings are taken happened before or after the passing of the Act. In all the cases before the Court the defendants were at the time the Act came into operation liable to prosecution, and an alteration of the time within which they might be prosecuted, whether by extension or diminution, was a matter of procedure only. If the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and in my view it would not have enabled a prosecution to be maintained even within six months from the offence.

PHILLIMORE J. I agree with the decision of my Lord and my brothers Lawrance and Kennedy.

Convictions affirmed.

Solicitors: *Moreton Phillips & Son; Coburn & Co.; Walker & Terry, Belper; Kingsford, Dorman & Co., for Kingsford, Arrowsmith & Wightwick, Canterbury; Percy Maylam, Canterbury.*

A. P. P. K.

1905
May 10.

COUNTY COUNCIL OF DURHAM AND COUNTY BOROUGH OF WEST HARTLEPOOL.

Local Government—Creation of County Borough—Loss of Borough's Contribution to County Expenses—Adjustment of Financial Relations—Compensation to County—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), ss. 32, 62.

By a provisional order and confirmation Act a borough theretofore forming part of a county was separated from the county and constituted a county borough, and thereupon the liability of the borough to contribute to the maintenance of the county bridges, main roads, and certain other county expenses ceased:—

Held, that the loss of this contribution was a matter with respect to which the arbitrator, appointed to adjust the financial relations between the county and the borough under s. 32 of the Local Government Act, 1888, had power to award compensation to the county.

CASE stated by an arbitrator.

By the Borough of West Hartlepool Order, 1902, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 12) Act, 1902:—

Art. II. "The borough" (of West Hartlepool, in that order referred to as the borough) "shall be constituted a county borough, and all the provisions of the" (Local Government Act, 1888, in that order referred to as the Act) "respecting county boroughs shall apply to the borough as if the borough had been named in the 3rd schedule to the Act, and as if Durham had been specified in that schedule as the county in which the borough should be deemed for the purposes of the Act to be situate."

Art. III. (1.) "An equitable adjustment shall be made respecting the distribution of the proceeds of the local taxation licences, of the estate duty, and of the local taxation (customs and excise) duties, and respecting all other financial relations or questions between the administrative county" (of Durham, in that order referred to as the administrative county) "and the borough."

(2.) "Any such adjustment between the administrative county and the borough shall be made by agreement between the council of the administrative county and the" (the cor-

poration of West Hartlepool, in that order referred to as the) "council of the borough within six months from the commencement of this order. . . . . In default of agreement between the parties concerned in the case of any such adjustment as aforesaid the adjustment may be made by the Local Government Board or if that Board think fit by an arbitrator appointed by them."

(3.) "For the purposes of any such adjustment as aforesaid the provisions of the Act relating to adjustments between administrative counties and county boroughs shall apply with the necessary modifications and the Local Government Board or an arbitrator appointed by them as the case may be shall be substituted in such provisions for the commissioners appointed under the Act, and notwithstanding anything in the provisions of this order or of the Act any such adjustment and the determination of any matter incidental or in relation thereto or consequent thereon shall when made by the Local Government Board be deemed to be made by them otherwise than as arbitrators, and any arbitrator appointed by them shall be deemed to be an arbitrator within the meaning of s. 62 of the Act, and the provisions of the Act shall apply accordingly: Provided—. . . . (B) that sub-s. 6 of s. 32 of the Act shall apply to any agreement or any award made under this article."

No equitable adjustment having been made by agreement between the county council of Durham and the council of the county borough of West Hartlepool within the six months specified in the order, the Local Government Board appointed Sir Hugh Owen as arbitrator to make the equitable adjustment. The arbitrator so appointed duly made his award, and with regard to a large portion of the sums directed by the award to be paid by the county council and the council of the county borough respectively no question arises, but with regard to certain other payments claimed by the parties respectively the arbitrator was requested to state his award in the form of a special case.

The particulars of the claims in question and the facts found by the arbitrator with regard to them are as follows:—

The county council claim that they shall be paid by the

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council of the county borough, in addition to the sums that under the other clauses of the award are to be paid by that council, the following sums:—

(1.) 5928*l.* in respect of the repair, maintenance, and improvement of county bridges;

(2.) 32,610*l.* in respect of the repair, maintenance, and improvement of main roads; and

(3.) 8174*l.* in respect of discontinuing contributions to miscellaneous expenses, being the expenditure of the county council on salaries, registration of voters other than parliamentary ownership voters, law charges, printing and stationery, weights and measures department, health department, election expenses, county rate basis expenses, petty sessional courts in the county, and office expenses.

The county council claim the sums specified above and numbered 1, 2, and 3 on the ground that owing to and since the constitution of the county borough they have been deprived of, and will for the future be deprived of, all contributions from the area within the county borough towards the expenses incurred by them in respect of the several purposes to which the claim relates, and the liability for such expenses is now and will continue to be imposed solely on the area of the county as diminished by the area which has been formed into the county borough. It is admitted by the council of the county borough that there are no county bridges or main roads within the area of the county borough, and that the contributions from the area within the county borough towards miscellaneous expenses have in past years prior to the constitution of the county borough exceeded the amount of such expenses incurred by the county council for that area.

The council of the county borough claim that they shall be paid by the county council, in addition to the sums which under other clauses of this award are to be paid by that council, the following sums:—

(4.) 3225*l.* in respect of children in industrial schools and in reformatories;

(5.) 3214*l.* in respect of subsidized roads; and

(6.) 305*l.* in respect of fines.

With regard to the item numbered 4, the council of the county borough claim the said sum of 3225*l.* on the ground that, owing to and since the constitution of the county borough, an increased burden has been thrown on the area within the county borough in respect of the expenses of the maintenance of children in industrial schools and reformatories, and that the burden on the area now comprised in the county has been thereby diminished. It is admitted by the county council that the contributions from the area within the county borough towards such expenses have in past years prior to the constitution of the county borough been much less than the actual expenditure of the county council in respect of the maintenance of the children sent to industrial schools and reformatories from that area.

With regard to the item numbered 5, the council of the county borough claim the said sum of 3214*l.* on the ground of the loss which the area within the county borough has sustained by reason of the discontinuance of the contributions which prior to the constitution of the county borough were made by the county council under s. 11, sub-s. 10, of the Local Government Act, 1888, towards the cost of the maintenance, repair, enlargement, and improvement of highways (not being main roads) in the area within the borough. It is admitted by the county council that during the three years next before October 1, 1902, they made, under the powers conferred on them by the said Act, voluntary contributions towards the cost of highways (not being main roads) in the area within the county borough, and that since the constitution of the county borough such contributions by the county council have necessarily ceased.

With regard to item numbered 6, the council of the county borough claim the said sum of 305*l.* on the ground that prior to the constitution of the county borough the share of the area within that borough in the proceeds of the fines levied at petty sessions throughout the county was on the basis of its rateable value in excess of the fines so levied in that area; that since the county borough was constituted the area within that borough has lost the allocation of that excess, and

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that in consequence an additional sum is available for allocation to the county. It is admitted by the county council that prior to the constitution of the county borough the share in the proceeds of the said fines which on the basis of its rateable value was allocated to the area within the county borough was in excess of the fines actually levied in that area.

It is agreed by the county council and the council of the county borough that if under an adjustment under the said order and the provisions of the Local Government Act, 1888, either of those councils has a valid claim against the other in respect of any of the items of claim above mentioned in consequence of the loss sustained by reason of the constitution of the county borough, the sum stated above in connection with each such item shall be deemed to be the sum which represents the amount of the loss.

The questions for the opinion of the Court are:—

(1.) Whether the loss sustained by the county council is under Art. III. of the said Borough of West Hartlepool Order, 1902, and the provisions of the Local Government Act, 1888, therein referred to, the subject of a valid claim against the council of the county borough in the case of any of the items of claim numbered 1, 2, and 3, and, if so, which.

(2.) Whether the loss sustained by the council of the county borough is, under the said order and provisions, the subject of a valid claim against the county council in the case of any of the items numbered 4, 5, and 6, and, if so, which.

Shearman, *K.C.*, and *R. I. Simey*, for the county council of Durham. The question is whether, upon a borough being taken out of the county and constituted a county borough, the loss to the county of that productive rate-paying area is matter for compensation under s. 32. (1) It has indeed been held by

(1) By the Local Government Act, 1888, s. 32, sub-s. 1, "An equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement within twelve months after the appointed day between the councils of each county and each borough, and in default of any such agreement, by the commissioners appointed under this

the House of Lords in *Caterham Urban Council* v. *Godstone Rural Council* (1) that where by an order under s. 57 of the Local Government Act, 1888, a parish has been taken out of a rural district and made into an urban district, the loss of that parish's contribution to the highway rates of the rural district is not matter of adjustment under s. 62. But the language of that section was very different from that of s. 32. It provided only for an adjustment of "property income debts liabilities and expenses"; and the Lords held that the adjustment of income there mentioned meant an adjustment of existing income, and had no reference to compensation for the loss of a source of income. Sect. 32, on the other hand, provides in sub-s. 1 "for an equitable adjustment respecting . . . . all financial relations," and goes on to say that, "save as provided by this Act, any existing liability to contribute or to incur expense shall after the appointed day cease, and an equitable provision for such cessation shall be made in the adjustment."

Act; and such adjustment shall provide in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and save as provided by this Act any existing liability to contribute or to incur expense shall after the appointed day cease and an equitable provision for such cessation shall be made in the adjustment."

Sub-s. 3: "In such adjustment regard shall be had to the existing property debts and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider."

Sect. 62, sub-s. 1: "Any councils and other authorities affected by this Act, or by any scheme order or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property income debts liabilities and expenses, so far as affected by this Act or such scheme order or thing, of the parties to the agreement, and the agreement and any other agreement authorized by this Act to be made for the purpose of the adjustment of any property debts liabilities or financial relations may provide for the transfer or retention of any property debts and liabilities," &c.

(1) [1904] A. C. 171.

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The liability of West Hartlepool to contribute to the maintenance of the county bridges and county roads having ceased, that clause in terms authorizes a monetary provision to be made for that cessation. There is nothing of that kind to be found in s. 62. Nor does s. 62 contain any clause corresponding to sub-s. 3 of s. 32, which provides that, "In such adjustment regard shall be had . . . . to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs." That goes to shew that the Legislature intended, in cases to which s. 32 applies, that there should be allowed compensation of the kind now claimed, although the word "compensation" is not in fact used. There were a number of county boroughs created by the Act of 1888 itself, which are specified in the 3rd schedule, and the commissioners appointed under the Act when making the adjustment required by s. 32 with respect to those boroughs took the same view of that section which is now contended for, and awarded to the counties from which the county boroughs were taken large sums as compensation for the loss to the county rates of the productive borough areas. The object of the Borough of West Hartlepool Order was to put that borough on the same footing as the boroughs in the 3rd schedule.

Cripps, K.C., Macmorran, K.C., and *Fleetwood Pritchard*, for the borough of West Hartlepool. No distinction in substance is to be drawn between s. 62 and s. 32, and the decision in the *Caterham Case* (1) applies here. Sect. 32 speaks only of adjustment, and "adjustment" is not an apt word to express the idea of compensation. Lord Halsbury in the *Caterham Case* (1) says: "I think the word 'adjustment' as distinguished from 'compensation' means a division of existing assets, while 'compensation' would quite rightly be interpreted to mean the loss of some right to obtain income by rating, or of some area which would furnish the right to get income." The words "financial relations" in s. 32 do not assist the county council's contention, for those words are also to be found in s. 62, and moreover, according to the view of Lord Davey, they must be

(1) [1904] A. C. 171.

understood as limited to "any reciprocal financial obligations which the undivided district and the severed portion may have already incurred towards each other." Sect. 32, like s. 62, deals only with the adjustment of existing property and liabilities. Whichever section one is considering the problem to be dealt with is the same, and whether the area that is being split up is a rural district or a county the same principle of adjustment ought to apply. The usual reason why a borough seeks to be taken out of the county and converted into a county borough is that it has been unfairly treated by the county, the county's expenditure within the borough being out of all proportion to the borough's contribution to the county rates. If, then, compensation is to be allowed for loss of the excess of rating over expenditure, the worse the borough has been treated the greater the compensation will be. The sums here claimed by the county council represent the capitalized value of the excess of contributions over expenditure during past years, so that the payment of them will keep alive in perpetuity the very evil from which by severance from the county it was sought to escape.

Shearman, K.C., in reply. Sect. 62 does not authorize the adjustment of "financial relations." The presence of the words "financial relations" in that section is owing to a reference back to s. 32. Sect. 62, after providing for an "agreement for the purpose of adjusting any property income debts liabilities and expenses," goes on to say, "and the agreement"—that is, the agreement under s. 62—"and any other agreement authorized by this Act to be made for the purpose of the adjustment of any property debts liabilities or financial relations"—including an agreement under s. 32—"may provide" as therein mentioned.

CHANNELL J. In my view there is a substantial difference between s. 32 and the section which was before the House of Lords in the *Caterham Case* (1), and in particular the difference is to be found in the last paragraph of sub-s. 1 of s. 32. The sub-section begins by providing for an "adjustment respecting

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. . . . all other financial relations." The word "respecting" seems somewhat vague and indefinite, but what I understand to be meant is that there is to be an adjustment of financial relations generally. And I may say here in passing that I think Mr. Shearman's explanation of the presence of those words "financial relations" in s. 62 is the correct one—namely, that agreements there mentioned as made for the purpose of adjusting financial relations are agreements authorized by the Act elsewhere than in s. 62—in other words, that they refer back to s. 32. The sub-section in the last paragraph says: "And such adjustment shall provide in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute." Before 1888 a very large number of things had been done for the boroughs by the county, and if the borough was a quarter sessions borough the expense of doing those things was not paid by the borough by means of direct county rating, but by a contribution raised by the borough itself upon precept. That is what those words refer to. They say that, notwithstanding the passing of the Act, some things will still continue to be done by the county for the borough, and as to those matters the adjustment is to provide. The sub-section then goes on: "And, save as provided by this Act, any existing liability to contribute or to incur expense shall after the appointed day cease, and an equitable provision for such cessation shall be made in the adjustment." That refers to such matters as the expense of maintenance of roads. There can be no doubt that the Act provides that the future liability to maintain the roads within the borough is to be borne by the borough, and the liability of the county to incur expense in connection with roads within the borough is to cease, and equally the liability of the borough to contribute to the expenses of the county in respect of roads outside the borough is to cease. And the commissioners were to make equitable provision for that cessation. Whether in making that provision it is right to capitalize the difference between the contributions and expenditure in recent years I entertain some doubt, but it is a matter for the arbitrator to consider what is

equitable. Sub-s. 3 is also important: "In such adjustment regard shall be had to the existing property debts and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act." I do not think that that means that the maintenance of the former financial position is to be limited to the financial position with respect to the licence duties and probate duty. The reference to those duties is introduced somewhat inartistically as an illustration of what was intended. I understand the words to mean that the parties respectively are not to be placed in a worse position generally. The scheme was to alter the machinery of local government, but to leave the large boroughs and the counties as far as possible in the same financial position that they were in before. I think, then, that it was within the power of the arbitrator to make an equitable provision of some kind for the cessation of the liability to contribute to the maintenance of the county bridges and main roads. And the same thing applies to the miscellaneous expenses, and to the cross-claims by the borough council against the county council.

Questions of arbitrator answered in the affirmative.

Solicitors for county council of Durham: *Maude & Tunnicliffe, for R. Simey, Durham.*

Solicitors for borough of West Hartlepool: *Baker & Co., for Higson Simpson, West Hartlepool.*

J. F. C.

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[IN THE COURT OF APPEAL.]

STRONG & CO., LIMITED, APPELLANTS; WOODIFIELD (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Trade—Balance of Profits—Deductions—Expenses incurred in earning Profits—Expenses payable out of Profits—Loss arising from Negligence—Hotel—Injury to Guest—Damages—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D.*

A brewery company were the owners of a hotel which was carried on by a manager on their behalf and as part of their business. A guest at the hotel, who was injured by the fall of a chimney, sued the company for negligence causing the injury, and recovered judgment for damages and costs, which the company paid. They also incurred costs in defending the action. On a case stated by Commissioners of Income Tax:—

Held, that the expenses to which the company had been put by reason of their negligence were not incurred by them in earning profits, but were payable out of profits after they were earned, and could not be deducted in estimating the profits of the year, for the purpose of the income tax, under Sched. D of the Income Tax Acts.

APPEAL from a judgment of Phillimore J. upon a case stated by Commissioners of Income Tax.

At a meeting of the Commissioners for the general purposes of the Income Tax Acts, Strong & Co., Limited, appealed against an estimated assessment made upon them for the year ending April 5, 1904, under Sched. D of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), upon their average profits for the three preceding years. The appellants were brewers carrying on business at Romsey and other places as brewers, maltsters, and wine and spirit merchants. From the memorandum of association of the company it appeared that one of the objects of the company was to acquire for any of the purposes of the company any hotels, beerhouses, or public-houses. In the accounts submitted by the company for the year ending September 30, 1902, they claimed a deduction in respect of an item of 1490*l.*, being damages and costs incurred by them in defending an action brought against them for injuries sustained by a guest at one of their licensed houses, and caused by the falling in of a chimney during a gale. The house was owned by the

company, and was under management at the time of the accident. The action was based upon the negligence of the company in allowing the chimney to get out of repair.

The company contended that, as in the course of their business as brewers it became necessary for the company at times to carry on business as innkeepers, and the profits of that business were included in the accounts of the company, and as the expenditure was incurred in the course of and incidental to the conduct of the concern, the profits of which were assessed, allowance must be made on account of such expenditure before the profits for the year could be ascertained. On behalf of the Crown it was contended that this expenditure could not be deducted, but was excluded by terms of the Income Tax Act, 1842, s. 100, Cases 1 and 2, rule 1, inasmuch as it was not "money wholly and exclusively laid out or expended for the purposes of such trade."

The Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sched. D, First Case, rule 3, provides that: "In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains . . . . on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern . . . ."; and rule 1 of rules applying to both the First and Second Cases provides that: "In estimating the balance of the profits or gains to be charged according to either of the First or Second Cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure or concern. . . ."

The Commissioners were of opinion that the deduction could not be allowed, but they stated a case for the opinion of the Court.

Upon the argument of the case the learned judge gave judgment for the appellants.

The respondent appealed.

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Sir R. B. Finlay, *A.-G.*, and *Sir E. H. Carson*, *S.-G.* (with them *S. A. T. Rowlatt*), for the Crown, in support of the appeal. The foundation of the action brought against the company is not stated in the case, but it appears by the pleadings that the cause of action was their negligence in not keeping the chimney in repair. The expense to which the company were put in that action cannot be deducted under the First Case, rule 3, for it was a "loss not connected with or arising out of" the company's trade, nor can it be deducted under rule 1 of the rules applying to the First and Second Cases, for it was not "money wholly and exclusively laid out or expended for the purposes" of their trade. There is no provision for deduction of a loss arising from personal negligence. Such a loss will diminish the annual value of the concern to the owners, but does not affect the amount of the profits on which the tax is payable. It is, in fact, payable out of those profits when they have been ascertained. In *Gresham Life Assurance Society* v. *Styles* (1) and *Reid's Brewery Co.* v. *Male* (2), relied on in the Court below, the business carried on involved, by its nature, payments or losses, which might properly be deducted, but those decisions have no application to the present case. In *Royal Insurance Co.* v. *Watson* (3) the question was whether a payment to a manager in commutation of his salary under an agreement for the purchase of an insurance business was part of the consideration, and therefore capital. The case is remote from the present one. The dictum of Lord Shand in that case, that damages obtained for wrongful dismissal form a deduction from gross profits in striking the balance liable to income tax, cannot be correct, for the payment of damages for a collateral wrong is not a disbursement or loss in the business carried on. If a brewer in going to his business place drives over a man, the connection between the business and the accident is too remote to make the payment of damages an incident of the business. So a newspaper is always liable to an action for libel, but damages recovered in such an action are not incidental to the business of publishing the newspaper.

(1) [1892] A. C. 309. (2) [1891] 2 Q. B. 1.
(3) [1897] A. C. 1.

It is submitted that the decision of the Commissioners should be restored.

[They referred also to *Brickwood & Co.* v. *Reynolds* (1), *Watney* v. *Musgrave* (2), and *Rhymney Iron Co.* v. *Fowler*. (3)]

Danckwerts, K.C., and *P. J. G. Henriques*, for the company. The profits of a trade are only arrived at after proper deductions are made. Payments made in consequence of the negligence of servants whose employment is necessary for the carrying on of the business are properly deducted, for the liability of the employer is a legal consequence of the relation of master and servant. The expression "balance of profits" is equivalent to "profits," as pointed out by Lord Blackburn in *Coltness Iron Co.* v. *Black* (4), and by Lord Halsbury in *Gresham Life Assurance Society* v. *Styles*. (5) The provisions of the rules under Sched. D take the form of a prohibition, but are in effect permissive of things not coming within the prohibition, as pointed out by A. L. Smith L.J. in *Brickwood & Co.* v. *Reynolds*. (6) The deduction sought in this case does not come within the prohibition as a loss not connected with the trade, for the loss arose in the course of carrying on the company's business, and was a payment incidental to that business, and expended for the purpose of the trade. Such losses must be taken into account in every business, for instance, in the case of a railway company it is a necessary incident that there may be negligence of servants causing accidents to passengers, and consequent liability on the company to pay compensation. Their profits could not be ascertained without deducting any sum they may have to pay as compensation.

The same rule will apply where the loss arises, not from the acts of servants, but from those of the person who has to pay the tax. If a surgeon were to be cast in damages for negligence in performing an operation he would be entitled to deduct the loss in estimating his profits. These are cases of payments made in the course of carrying on the business, and are therefore

(1) [1898] 1 Q. B. 95.
(2) (1880) 5 Ex. D. 241.
(3) [1896] 2 Q. B. 79.
(4) (1881) 6 App. Cas. 315, at p. 333, 334.
(5) [1892] A. C. 309, at p. 314.
(6) [1898] 1 Q. B. 95, at p. 103.

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distinguishable from the illustration given of driving over a man in the street. The loss in this case was not voluntarily incurred, nor was it unconnected with the business; on the contrary, it was incident to the carrying on of the business, and the deduction should be allowed.

[They referred to *Sandys* v. *Florence*. (1)]

Sir R. B. Finlay, A.-G., in reply.

COLLINS M.R. This is an appeal by the Crown from a judgment of Phillimore J. The question raised in the case is whether, in making out an account for income-tax purposes, the company, who are innkeepers, and are the persons to be charged, are entitled to deduct a sum which became payable by them to a customer, who was enjoying the hospitality of the inn, and while sleeping there suffered injury from the fall of a chimney upon him, owing to the negligence of the persons whose business it was to see to the condition of the premises. I say that the fall of the chimney was due to the negligence of the persons whose business it was to see to the condition of the premises, that is the company, because we have before us the pleadings in the action by the customer against the company, which resulted in the obligation of the defendants to pay the sum they seek to deduct.

The brewery company, as part of their business, became the owners of the inn, and put in a manager to conduct it for them and as part of their business. They are entitled to say that the business of the inn was their business, and they justify the deduction on the ground that it was an expense incidental to the conduct of their business, and should be taken into account in ascertaining the profits upon which income tax is payable. This view commended itself to the learned judge in the Court below, and the Crown appeal against his judgment.

No doubt cases difficult to distinguish, on one side of the line or the other, can be put, and have been put in the argument before us, but, I think, when the broad basis of the matter, as it may be gathered from the Income Tax Acts, is

(1) (1878) 47 L. J. (Q.B.) 598.

looked at, the case becomes comparatively simple. The First Rule under s. 100 of the Income Tax Act, 1842, relating to duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of the Act, reads thus: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed." The Third Rule deals with deductions: "In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern." I need not read the rest of the rule, and I come to the rules applicable to both the First and Second Cases. The first of these rules is: "In estimating the balance of the profits or gains to be charged according to either of the First or Second Cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, for any disbursements or expenses whatever, not being money wholly

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and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern." The rest of the rule I need not read.

It seems to me, looking at these rules, that the root of the matter is that all expenses necessary for the purpose of earning the profits may properly be deducted, but that expenses to come out of the profits after they are earned cannot be deducted, unless there can be found some express provision of the Act authorizing the deduction. It seems to me, therefore, that unless it can be shewn that the expenses in respect of damages and costs paid as the result of the negligence of the owners of the inn were expenses necessarily incident to the earning of profit in carrying on their trade, they cannot be deducted. The cardinal distinction seems to me to be that those expenses were not a sum that had to be paid as a condition of earning the profits, but, in point of fact, a sum which the company were compelled to pay out of the profits after they were earned. In my opinion there is no provision in the Act which authorizes such a deduction, but, on the contrary, the words used in the rules specifically exclude such a deduction. It certainly would let in very odd consequences if the person whose income is to be assessed were entitled to deduct damages payable by him in respect of his own personal negligence. That is the case we have to consider, though similar expenses due to the negligence of servants may to a great extent be open to the same considerations. It is, however, inadvisable to deal with anything but the exact point that is placed before us for decision, and, therefore, I confine my remarks to the case of negligence of the person who is assessed. In this case there was negligence on the part of persons who stand for the company in allowing the premises in which the company were carrying on business to be in the state they were in when the injury to the guest happened.

I do not think it necessary to follow out the different instances put in argument. I think that in stating what I conceive to be the principle governing this case I have given a ground for differing from the conclusion at which my brother Phillimore arrived. I think the learned judge recognised the

distinction between an expense necessarily incurred as an incident of the business and an expense payable out of the profits after they are earned, but that he came to a conclusion, in which I must confess I cannot follow him, that this particular expense was incurred in the course of earning the profits. With the greatest respect, I am unable to agree with that conclusion, and in my opinion the appeal must be allowed.

MATHEW L.J. I am of the same opinion. If the question were put, What was the cause of the expense incurred in this case? the answer should be, Because the brewers chose to carry on their business in a house which was defective and dangerous. Is such an expense a matter in respect of which a deduction is permissible under the Income Tax Acts? Let me endeavour to illustrate the position by reference to a claim made by a passer-by, who is under no contract with the owner of the premises, and is injured by the fall of a chimney. He would have a claim arising out of the negligence of the occupier of the house. Could it be said that the expense to which the innkeeper might be put in consequence of that claim was a loss connected with or arising out of his trade as innkeeper? That could not be said, and in principle it can make no difference that the innkeeper has entered into a contract to take care of a man who comes to his house as a guest and is injured in a similar manner. The phrase that occurs in the rules relating to deductions is not "incurred in the course of carrying on the business," but is "connected with or arising out of such trade." The loss in this case was not connected with or incidental to the business of an innkeeper, and the numerous illustrations that have been offered are disposed of at once by pointing that out. The loss here was due to the neglect of the company to keep the premises in repair, and I cannot see on what principle they can claim this deduction. They have earned their profits of the business and, out of that fund, they were compelled to pay the expenses in question. A deduction for expenses incurred in such a way does not seem to me to come within the language or the spirit of the Act, and I agree that the appeal must be allowed.

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COZENS-HARDY L.J. I am of the same opinion. It seems to me that the expense to which the company have been put is not a loss connected with or arising out of their trade within the meaning of the Act. It is not a loss reasonably incident to the earning of profits. It may not, and I am disposed to think it does not, follow necessarily that every expense incurred in earning profits is to be allowed as a deduction; but I think it is true to say that no loss ought to be allowed unless it has been incurred in earning profits. In the present case there has been a loss which must be borne out of the profits when ascertained. The case is analogous to that put by Lord Herschell in *Gresham Life Assurance Society* v. *Styles* (1) in commenting on the case of *Alexandria Water Co.* v. *Musgrave* (2), where he was dealing with payments of interest to debenture-holders, and said: "The payments of interest to the debenture-holders were made out of the profits. These were ascertained by deducting from the moneys earned the expenses incurred in earning them, and of these expenses the payments to the debenture-holders formed no part." So here the damages incurred for negligence form, as it seems to me, no part of the expenses incurred by this company in earning profits on which income tax must be paid.

Appeal allowed.

Solicitors for appellants: *Metcalfe, Birkett & Rowlatt.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1892] A. C. 309, at p. 325. (2) (1883) 11 Q. B. D. 174.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1905
June 8.

LLOYD'S BANK, LIMITED *v.* MEDWAY UPPER NAVIGATION COMPANY.

Practice—Equitable Execution—Receiver — Ex parte Injunction — Order L., r. 15 (*a*), *App. K, Form No.* 61 (*a*).

Where on the issue of a summons for the appointment of a receiver of property by way of equitable execution an order was made ex parte in the form App. K, No. 61 (*a*) (1), for an injunction to restrain the judgment debtors from dealing with the property until after the hearing of the application:—

Held, that the injunction ought not to be granted in the absence of anything to shew that there was danger of the property being made away with by the judgment debtors before the hearing of the application for a receiver.

APPEAL against an order of Jelf J. at chambers refusing to dissolve an injunction as after mentioned.

The defendants were a company incorporated under a special Act for the improvement and maintenance of the navigation of the Upper Medway, with power to hold lands for the purposes of their undertaking and to take tolls for the use of the navigation. The plaintiffs had obtained against the defendants judgment in an action for a sum of 2585*l.* 13*s.* 7*d.* The judgment remaining unsatisfied, the plaintiffs applied at chambers for a summons for the appointment of a receiver by way of equitable execution. The affidavit filed by the plaintiffs for the purposes of the application stated that, with the exception of a few goods consisting of office furniture, &c., of the value of 50*l.* or thereabouts, the defendants had no goods or chattels on which the plaintiffs could cause legal execution to be levied; that the defendants were possessed of and entitled to the tolls and rents arising from the navigation of the upper portion of the river Medway, and also of and to the profits of the business of carriers carried on by them, and of and to other rents and profits incidental to their undertaking; and that the defendants were also possessed of freehold land and premises, and rents

(1) So numbered in the "Annual Practice." This numbering appears not to be official. The form is an additional form prescribed under Order LXI., r. 33, and is numbered 26 I in the "Yearly Practice."

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and increment arising therefrom, which said lands were situated at Tonbridge and other places specified on the river Medway and elsewhere. Upon this affidavit an order was made at chambers in the form App. K, No. 61 (*a*), for a summons for a receiver with injunction, which, so far as material, was as follows: "Let the defendants attend the judge in chambers . . . . on the hearing of an application on the part of the plaintiffs for the appointment of S. W. Burgess, the manager of the plaintiffs' branch bank at Tonbridge, as receiver in this action without security or remuneration, plaintiffs being answerable for his acts or defaults, to receive the rents, profits, and moneys receivable in respect of the defendants' interest in the following property, namely, the tolls and rents arising from the navigation of the river Medway, and also in the profits of the business of carriers carried on by the defendants, and in other rents and profits of and incident to the defendants' undertaking; also certain freehold lands and premises, and rents and increment arising therefrom, which said lands are situate at Tonbridge and other places on the river Medway and elsewhere, in satisfaction of the sum of 2585*l.* 13*s.* 7*d.*, and costs, due under the judgment in this action; and, the plaintiffs by their solicitors hereby undertaking to abide by any order the Court or a judge may make as to damages in case the Court or a judge should hereafter be of opinion that the defendants shall have sustained any by reason of this order which the plaintiffs ought to pay, it is ordered and directed that the said defendants, their agents, and servants, and every of them be restrained, and an injunction is hereby granted restraining them and every of them, until after the hearing of the above application, from selling, charging, or otherwise dealing with the said property."

The defendants applied to Jelf J. at chambers to dissolve the injunction granted by the above-mentioned order, but the learned judge dismissed the application.

Upjohn, K.C., and *J. G. Wood*, for the defendants. It is well settled by *Holmes* v. *Millage* (1) and other cases that the Judicature Act does not give power to appoint a receiver, or to

(1) [1893] 1 Q. B. 551.

grant an injunction, in cases where the Court of Chancery would not have done so before the Act. It was not the practice in the Court of Chancery to grant such an injunction as was granted here without any evidence of danger that the property would be made away with or removed from the jurisdiction of the Court. In the absence of anything to shew that there was any likelihood of the defendants' making away with any of the property in respect of which the appointment of a receiver was asked for pending the hearing of the application, the order for such an injunction ought not to have been made. The injunction would render it impossible for the defendants to take tolls or carry on their business, and that without a particle of evidence to shew that such an injunction was required.

[They were stopped by the Court.]

Holman Gregory, for the plaintiffs. It is submitted that it is not necessary, in order that an order for an injunction should be made as in the Form 61 (*a*), that there should be any statement on affidavit shewing danger of the defendants' removing or making away with the property before the hearing of the application for a receiver. The practice is stated on p. 712 of the 1st volume of the Annual Practice for 1905, and it does not appear that there is any necessity for any statement on affidavit as to any such risk. It is a matter for the discretion of the judge, and he has exercised his discretion in this case. Upon the construction of the injunction, it does not appear to apply to the tolls or to prevent the defendants from receiving them.

COLLINS M.R. I am of opinion that this appeal must be allowed. The practice of granting equitable execution was of course unknown to the Common Law Courts before the Judicature Act. After that Act was passed judges in the Queen's Bench Division appear at first to have taken somewhat too wide a view of the powers given by the Act, and to have sometimes granted orders for the appointment of a receiver without fencing them round with the conditions which had been common in the Courts of Chancery. The present practice seems to have been introduced with a view of restricting the

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too great freedom with which orders for the appointment of receivers had been made in the Queen's Bench Division. Judges appear to have sometimes appointed receivers on ex parte applications, and, it being found that this practice was attended with difficulties and drawbacks, it was changed, and provision was made for notice of the application for a receiver being given. That practice of course involves an interval between the notice of the application and the hearing of it, during which there may be a danger in some cases of the property to which the application relates being made away with by the judgment debtor. Provisions for the purpose of meeting that danger appear to have taken shape in the form App. K, No. 61 (*a*), which would seem primâ facie to be applicable to all cases, and to treat the injunction contained in it as ancillary to the summons to the debtor to attend at a later date upon the hearing of the application. In so far as it might be thought to involve that such an injunction is necessarily an ancillary in such a case, it would appear to be a departure from the practice of the Court of Chancery, where such an injunction would seem not to have been granted on a mere presumption that a person would make away with the property in order to defeat the application for a receiver. In such a case the practice in the Court of Chancery would seem to have required that there should be an averment of, and some evidence of, danger that the property might be subtracted from the jurisdiction of the Court. The terms of Form 61 (*a*) do seem primâ facie to be to the contrary of that practice, and to substitute a hard and fast rule for the exercise of an individual discretion by the judge as to the granting of an injunction. Here there is no allegation of any believed intention on the part of the debtors to remove the property in respect of which the appointment of a receiver is asked for out of the jurisdiction of the Court. In the absence of any suggestion on oath of any such danger, I see no ground for an injunction in this case. In these circumstances I think the learned judge was wrong in refusing to dissolve the injunction. He seems to have followed what he supposed to have become the settled practice in such cases, and I do not think that he sufficiently

considered the particular facts in reference to this case. When one scrutinizes the terms of the affidavit, there appears to be nothing in it to justify the granting of an injunction in this case. For these reasons I think that the appeal must be allowed.

MATHEW L.J. I am of the same opinion. Reliance has been placed on the terms of Form 61 (*a*). I think that form was intended to be applicable to the ordinary case in which, there being a danger of the property being made away with before the hearing of the application for a receiver, the Court intervenes to protect it from that danger. I do not think that it can possibly have been intended by that form that, on its being shewn that there is property in respect of which the Court has jurisdiction to appoint a receiver by way of equitable execution, it should in all cases necessarily follow without more that there must be an injunction as in Form 61 (*a*). I do not think that there is any practice by which such an injunction must as a matter of course be granted where, as in the present case, there is a total absence of anything to shew that there is any danger of the property being made away with by the judgment debtor, pending the appointment of the receiver.

COZENS-HARDY L.J. I agree. I should be sorry that there should be any doubt that in many cases Form 61 (*a*) is the proper form of order; or that, if property is in danger, in respect of which an application for the appointment of a receiver is pending, in a case where the Court has jurisdiction to appoint a receiver, the Court has power to protect it by granting an ex parte injunction until the hearing of the application. The Court might obtain the same result by appointing a receiver ex parte, but that course may involve increased expense and delay. It is a very long step further to say that, as a matter of course, and without any allegation, much less proof, of any danger of the property being made away with, a judgment creditor can get an injunction ex parte to restrain the judgment debtor from any dealing with his property. It appears to me that the judge in dealing with an application of this kind must have regard to the facts alleged and proved in the particular

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case, and must not proceed on the general idea that the injunction is a matter of course, upon the filing of such an affidavit as in the present case, without any allegation of any danger that the property will be made away with by the defendant.

Appeal allowed.

Solicitors for plaintiffs: *Church, Adams & Prior.*
Solicitors for defendants: *Tarry, Sherlock & King.*

E. L.

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May 25; *June* 9.

[IN THE COURT OF APPEAL.]

FITZROY *v.* CAVE.

Assignment of Debt—Chose in Action—Maintenance—Indirect Motive on part of Assignee—Trust in respect of Moneys recovered—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The plaintiff took from creditors of the defendant an absolute assignment of their debts in consideration of a covenant by him that, if he should recover the amount of the debts from the defendant, he would pay over to them the amounts of their respective debts or so much thereof as he might be able to realize after payment of the costs necessarily incurred by him. Notice in writing of the assignment was given to the defendant. It appeared that the plaintiff and the defendant were co-directors of a company, and the plaintiff, being dissatisfied with the action of the defendant as director of the company, took the assignment with a view to procuring an adjudication of bankruptcy against the defendant, and so getting him removed from the directorate of the company:—

Held (by Collins M.R., Mathew L.J., and Cozens-Hardy L.J., the M.R. doubting), that the assignment of the debts was not invalid as savouring of maintenance or being otherwise against public policy.

Comfort v. *Betts*, [1891] 1 Q. B. 737, followed.

APPEAL from the judgment of Lawrance J. in an action tried before him without a jury.

The action was brought by the plaintiff as the assignee of certain debts.

It appeared that the defendant was at the date of the aftermentioned deed indebted to five tradesmen in Ireland in various sums, amounting in all to 90*l.* 11*s.* 5*d.*, in respect of goods sold and delivered by them respectively to him. By a deed dated October 13, 1904, and made between these tradesmen of the

one part and the plaintiff of the other part, after reciting that the parties of the first part had agreed to assign the said debts to the plaintiff upon the terms and for the consideration thereinafter set forth, it was witnessed that, in pursuance of such agreement, and for and in consideration of the covenant and agreement on the part of the plaintiff thereinafter contained, the parties of the first part thereby respectively assigned to the plaintiff the said debts to hold the same respectively to the plaintiff absolutely. The deed then proceeded: "And the assignee hereby covenants with the assignors, and with each of them, that, in case he shall be able to recover and realize the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realize, after payment of all costs necessarily incurred by him." Notice in writing of this assignment had been given to the defendant.

It appeared in evidence that the plaintiff was interested in, and a director of, a company called the Cork Mineral Development Company. The defendant was a co-director and the local manager of the company. The plaintiff, being dissatisfied with the action of the defendant as a director of the company, had, acting under the advice of a solicitor, taken the assignment of the before-mentioned debts with the view of procuring an adjudication in bankruptcy against the defendant, and so getting him removed from the directorate of the company.

Lawrance J. held, with some doubt, that, under these circumstances, the assignment was invalid as savouring of maintenance or otherwise against public policy, and therefore gave judgment for the defendant.

May 25. *Roskill, K.C.*, and *Raymond Asquith*, for the plaintiff. Maintenance is where a person maintains a litigation, having no interest in the subject-matter of it, nor any relation to the litigant which justifies him in doing so: *Bradlaugh* v. *Newdegate*. (1) The plaintiff in this case being the

(1) (1883) 11 Q. B. D. 1.

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assignee for good consideration, and legal owner of these debts, cannot possibly be said to have had no interest in the subject-matter of the litigation. The case of *Comfort* v. *Betts* (1) is a clear authority to shew that such an assignment of debts as that in the present case is good and avails to pass the legal property in the debts. There is nothing that even savours of maintenance, or that is against public policy, in such a transfer of the property in debts for good consideration. It has been suggested that this transaction savours of maintenance, or is against public policy, on account of the motives of the plaintiff in procuring the assignment. It is submitted that the law cannot inquire into the motives with which an assignment of debts primâ facie lawful is procured. A lawful transaction cannot be made unlawful on account of the inner motives of the person entering into it: *Bradford Corporation* v. *Pickles*. (2) The present case stands on the same footing legally as if the plaintiff had purchased these debts for cash. There are authorities no doubt which shew that an assignment of a mere right of action, such as a right of action for damages for defamation, is invalid as amounting to maintenance: see *Alabaster* v. *Harness* (3); *May* v. *Lane* (4); *Torkington* v. *Magee* (5); *Prosser* v. *Edmonds*. (6) But an assignment of anything in the nature of property is valid: see *Dawson* v. *Great Northern and City Ry. Co.* (7); *Tolhurst* v. *Associated Portland Cement Manufacturers* (8); and the motives which induced the purchase of the property cannot be material. Moreover, it is submitted that there was nothing unlawful in the purpose for which the plaintiff procured the assignment of the debts. He had no malice against the defendant personally. He was entitled in his own interest, and for the preservation of the money which he had invested in the company, to take any lawful step to remove the defendant from the directorate.

[They also cited *Hare* v. *London and North Western Ry. Co.* (9)]

(1) [1891] 1 Q. B. 737.
(2) [1895] A. C. 587.
(3) [1894] 2 Q. B. 897; [1895] 1 Q. B. 339.
(4) (1894) 64 L. J. (Q.B.) 236.
(5) [1902] 2 K. B. 427; [1903] 1 K. B. 644.
(6) (1835) 1 Y. & C. Ex. 481; 41 R. R. 322.
(7) [1905] 1 Q. B. 260.
(8) [1903] A. C. 414.
(9) (1860) Joh. 722.

Holman Gregory, for the defendant. On the assumption that the assignment of the debts to the plaintiff was valid in law, it no doubt easily follows that there is nothing in the nature of maintenance in the transaction. But this assumption really begs the whole question. It may be admitted that there was a good legal assignment of the debts in point of form, but a transaction which in substance contravenes public policy, or savours of maintenance, cannot be made good by being clothed in a legal dress. It is submitted that to purchase a right of action with such a collateral and indirect motive as actuated the plaintiff in this case savours of maintenance, even if it does not come exactly within the definition of it; and the authorities shew that the law will not recognise such a purchase as valid. It is a transaction which brings about litigation, which would never have been initiated by the creditors themselves, and that not by way of a bonâ fide commercial speculation, but with a sinister and malicious purpose. Moreover, there was not in this case, in substance, a purchase of these debts. The plaintiff had really no interest in the debts themselves, and his only interest in the litigation was of a collateral and indirect character. The transaction really stands on the same footing as if the plaintiff had got the creditors to allow him to sue in their names on the terms that he would indemnify them against costs, and account to them for the proceeds of the action, with the indirect motive of rendering the defendant's position as director untenable. It is submitted that that would clearly have been maintenance, or have savoured of maintenance. It can make no difference that in point of form there was an absolute assignment of the debts. [He cited *Harrington* v. *Long* (1); *Wallis* v. *Duke of Portland* (2); *De Hoghton* v. *Money* (3); *Rees* v. *De Bernardy* (4); *Wood* v. *Downes*. (5)]

Roskill, K.C., in reply.

Cur. adv. vult.

(1) (1833-4) 2 My. & K. 590; 39 R. R. 304.
(2) (1797) 3 Ves. 494; 4 R. R. 78.
(3) (1866) L. R. 2 Ch. 164.
(4) [1896] 2 Ch. 437, 446.
(5) (1811) 18 Ves. 120; 11 R. R. 160.

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June 9. COLLINS M.R. read the following judgment:— This is an action originally started under Order XIV., but sent to be tried in the short cause list. Lawrance J. has given judgment for the defendant, and the plaintiff appeals. The facts appear from the affidavits made under Order XIV. and from the evidence of the plaintiff given at the trial. The plaintiff claimed as assignee of some small debts assigned to him by various creditors of the defendant on the terms of a deed which the plaintiff had caused to be prepared under the advice of a solicitor. The plaintiff explained that his object in taking these assignments was that he was desirous of getting rid of the defendant as a co-director of a company in which they were both interested, being satisfied that it was for the best interests of the company that the defendant, with whose conduct he was thoroughly dissatisfied, should be removed from the board. The defence was that the conditions of the assignment and the purpose for which it was procured rendered it unenforceable as evidencing a transaction which savoured of maintenance. The learned judge was of that opinion, and gave judgment for the defendant. There is no dispute about the facts. The plaintiff's statement in cross-examination, as appears by the judge's note, was: "I want to get him off the board and I want to make him bankrupt, and he would have to leave the board . . . . Sole object was to get right of action to make him a bankrupt." It is necessary to scrutinize the terms of the assignment. The deed, which was made between five persons resident in Ireland of the one part and the plaintiff of the other part, after reciting that the defendant was indebted to the five parties of the first part in certain sums, and that they had agreed to assign the said debts to the plaintiff upon the terms and for the consideration thereinafter set forth, witnessed that in pursuance of such agreement and for and in consideration of the covenant and agreement on the part of the plaintiff thereinafter contained, they, the parties of the first part, thereby assigned to the plaintiff all the said debts to hold the same respectively to the plaintiff absolutely. The deed then proceeded: "And the assignee hereby covenants with the assignors, and with each of them, that, in case

he shall be able to recover and realize the amount of the said debts from the said Arthur Oriel Singer Cave, he will immediately thereupon pay over to them, the assignors, their executors, administrators, and assigns, the said respective amounts, or so much thereof as he may be able to recover or realize after payment of all costs necessarily incurred by him." It is to be observed that no consideration is given by the assignee under the terms of this document, except the undertaking to hand over so much as he may be able to recover after payment of all costs necessarily incurred by him. If nothing is realized, no costs will be payable by the assignors. It seems to me, therefore, that under this arrangement he acquired nothing but a bare right of litigation, giving him no interest in the proceeds, but enabling him to take collateral proceedings for an ulterior purpose. Had he, without taking an assignment, undertaken to find the money for the litigation to be followed up to bankruptcy, I think the case of maintenance would be quite clear in its simplest form, unless actions to recover debts are incapable of being the subject of maintenance. So long as the real transaction is the same, the form in which it is carried out ought not to alter the legal effect, and in the view of a Court of Equity it was not allowed to do so. Whether maintenance or not in the strictest sense, it savoured of maintenance: see *Wood* v. *Downes* (1), *Prosser* v. *Edmonds* (2), and *Harrington* v. *Long*. (3) The terms of the assignment in this case, by which the assignor pays no costs and has to submit to a deduction for them only in the case of a sum being realized from which such deduction can be made, seem to be equivalent in this respect to the deed of indemnity to which so much importance was attached in the last of the above cases. The illustrations given in argument in that case by the defendant's counsel, both on the hearing before the Master of the Rolls and on the rehearing before Lord Brougham, seem to cover the precise facts of this case. Assuming, therefore, that actions of debt do not stand on a

(1) 18 Ves. 120, at pp. 125, 126; 11 R. R. 160.

(2) 1 Y. & C. Ex. 481, at pp. 496 et seq.; 41 R. R. 322.

(3) 2 My. & K. 590; 39 R. R. 304.

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different footing in this respect from all other actions, and are capable of being made the subject of maintenance, in my opinion, but for the case of *Comfort* v. *Betts* (1), the argument for the defendant ought to succeed. That is a decision of the Court of Appeal, and binds us, unless there is such a difference in the terms of the assignment as to distinguish it from the assignment in this case. There is nothing mentioned in the *Law Reports* as to the provision for costs. The effect of the transaction, however, was referred to in these terms by Lord Esher M.R.: "Large numbers of debts were assigned to debt collectors without their having any interest in such debts and merely for the purpose of their being sued for"; and we were told by the appellant's counsel that the conditions of the assignment were the same as those in this case; and from the report in 64 L. T. 685 this would seem to be so. If this be so, I see no reason why the transaction might not have been impeached on precisely the same grounds as those which were urged in this case. It is true that the point of maintenance was not distinctly raised, but some considerations of public policy were undoubtedly discussed, and the Court held that the assignment was good under s. 25, sub-s. 6, of the Judicature Act, 1873. The decision is, therefore, an authority in this Court that such an assignment can be enforced. No doubt there was no evidence in that case as there is here of a special collateral purpose for which the assignment was taken; but, if the transaction as described in the document was free from all taint of maintenance, the title of the assignee was absolute, and could not be impeached because he acted maliciously in contemplation of law in enforcing it: see *Stevenson* v. *Newnham* (2); *Bradford Corporation* v. *Pickles*. (3) Without, therefore, attempting to grapple with the broader question whether at the time when that case was decided actions to recover debts had ceased to be a possible subject of maintenance, I think it binds us, and I am constrained to differ from the conclusion of the learned judge below, and to hold that the plaintiff is entitled to judgment. The appeal must be allowed.

(1) [1891] 1 Q. B. 737. (2) (1853) 13 C. B. 285.
(3) [1895] A. C. 587.

COZENS-HARDY L.J. read the following judgment:—This is an appeal from the judgment of Lawrance J. in favour of the defendant. The plaintiff is the assignee of five debts amounting together to over 50*l.* due from the defendant to five creditors resident in Ireland. The assignment is effected by a deed dated October 13, 1904. It is in the common form of an absolute assignment, but there is no pecuniary consideration, and the assignee takes no beneficial interest, for he covenants that, in case he is able to recover the amount of the debts from the defendant, he will pay over to the assignors the respective amounts or so much thereof as he may be able to recover or realize after payment of all costs necessarily incurred by him. Now the existence of the debts is not disputed, and unless the plaintiff can recover the amounts the defendant has been relieved from all responsibility. It has, however, been strenuously contended by Mr. Gregory in his very able argument that the plaintiff's action is open to the objection of maintenance, or is otherwise such that on grounds of public policy the Court ought to refuse its assistance. This view was adopted by the learned judge.

It is desirable to consider the limits of the doctrine of maintenance as applied to choses in action. There are undoubtedly many choses in action which are not and never were assignable either at law or in equity. A right to set aside a deed on the ground of fraud is a typical instance. It is plain that no Court would allow the assignee of such a right to maintain an action. The instrument would be equally void at law and in equity. And an agreement by which a third person (not being within the recognised exceptions, such as that of master and servant) undertakes to institute or prosecute or assist the litigation in the name of the claimant, and to indemnify him wholly or partly against the costs of the litigation, is on principle open to precisely the same objection. If not technically maintenance, it savours of maintenance. This is well illustrated by Lord Eldon's judgment in *Wood* v. *Downes* (1), and by Lord Abinger's judgment in *Prosser* v. *Edmonds*. (2) The case of *Harrington*

(1) 18 Ves. 120; 11 R. R. 160. (2) 1 Y. & C. Ex. 481; 41 R. R. 322.

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v. *Long* (1) is inadequately reported, but it seems to me to be only another instance of the same principle. For the supplemental bill, in which the assignee and assignor were co-plaintiffs, sought to set aside a deed of gift by the testator in favour of the defendant, and the assignment was executed and the deed of indemnity was given "solely for the purpose of enabling him" (i.e. the assignee) "to prosecute the original suit and to impeach the deed."

There are, however, other choses in action which, though not assignable at common law, were always regarded as assignable in equity. A debt presently due and payable is an instance. At common law such a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was, with some exceptions which need not be referred to (see 1 Hawkins' Pleas of the Crown, p. 458), looked upon as open to the objection of maintenance. After a time the Common Law Courts recognised the right of any one who had a pecuniary interest in the debt to sue in the name of the creditor. This, however, was the limit of their departure from the old strict rule, so far as I have been able to discover. But the Courts of Equity took a different view: *Row* v. *Dawson*. (2) They admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident. They declined to hold such a transaction open to the charge of maintenance. Thus, in *Prosser* v. *Edmonds* (3), Lord Abinger says: "With respect to the question as to the validity of an assignment of a right to file a bill in equity" (i.e., to set aside an alleged fraudulent deed), "I must distinguish between this sort of case and the assignment of a chose in action" (i.e., a debt). And again (4): "It was urged . . . . that the assignee of a chose in action" (i.e., a debt) "may file a bill in equity to

(1) 2 My. & K. 590; 39 R. R. 204.

(2) (1749) 1 Ves. Sen. 331.

(3) 1 Y. & C. Ex. 481, at p. 491; 41 R. R. 322.

(4) 1 Y. & C. Ex. at p. 496.

recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me that, in order to give the assignee a locus standi in a Court of Equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. . . . . So, where a person takes an assignment of a bond, he has the possession; and, though a Court of Equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a Court of Equity to enforce payment of it." A Court of Equity recognised not merely transactions which amounted to sales or mortgages of debts, under which the assignee took a beneficial interest in the debt, but also the creation of trusts, under which the trustee took no interest. Thus A., the creditor, might assign the debt to B., with or without a power of attorney, upon trust for C. Or A. might simply declare himself a trustee of the debt for C. In either case the trustee would take no beneficial interest, and would, by virtue of his position as trustee, be entitled to be indemnified out of the moneys recovered against all costs of the action brought in the name of A. against the debtor. If the debt were secured by a promissory note or bill or other negotiable instrument, A. might deliver the instrument to B. upon trust for C., and B. could sue at law on it. Or A. might create a trust in favour of himself by delivering the instrument to B. upon trust for himself. It would, I apprehend, in this case be no objection to say that B. had no interest in the debt. It has never, so far as I am aware, been suggested that a trustee to whom a debt is assigned is exposed to a charge of maintenance. Mortgages are every day dealt with in this fashion, including an assignment of the debt. From time to time particular classes of obligation have by statute been rendered assignable at law, and by the Judicature Act, 1873, s. 25, sub-s. 6, any debt is made assignable at law by an absolute assignment in writing, of which notice is given to the debtor. Henceforth in all Courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods. And on principle I think it is not possible to deny the right of the owner of any property capable

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of legal assignment to vest that property in a trustee for himself, and thereby to confer upon such trustee a right of indemnity. It is not easy to see how the doctrine of maintenance can be applied to a case like the present. The decision of this Court in *Comfort* v. *Betts* (1) really proceeds upon this footing, and seems to me to be decisive of the present case. The Court is not asked to exercise any discretionary jurisdiction. If the assignment is valid at all, it is valid in all Courts, and the plaintiff is entitled to judgment ex debito justitiæ. The plaintiff is merely seeking by this action to recover payment of debts admitted to be justly due. It is said that the plaintiff does not really desire to be paid and can take nothing for his own benefit under the judgment. For the reasons above stated I think this is of no moment. It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. But I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result. In my opinion this appeal must be allowed.

Mathew L.J. agrees with this judgment.

Appeal allowed.

Solicitor for plaintiff: *Herbert Z. Deane.*

Solicitors for defendant: *Leigh & Naish.*

(1) [1891] 1 Q. B. 737.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1905
June 21.

THE ATTORNEY-GENERAL *v.* THE LONDON COUNTY COUNCIL.

Revenue—Income Tax—Charge upon Property in excess of Annual Value—Interest on Borrowed Money—Right to deduct and retain Income Tax—Interest "paid out of Profits or Gains brought into Charge"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *No. IV., r.* 10—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The defendants are in receipt of a large annual income derived from interest on loans and rents, and they are also possessed of certain land which they occupy themselves. They have from time to time under their statutory powers borrowed large sums of money, and in respect thereof have created capital stock, which stock and the dividends thereon are charged upon all their property, including the land occupied by them. The annual interest payable upon that stock is considerably in excess of the annual income received by them and of the annual value of the land occupied by them taken together; and the amount by which their income is insufficient to pay the interest on the stock they raise by means of rates:—

Held, that under the circumstances the defendants have no taxable income, and that when paying the interest upon their stock to the stockholders they are entitled to deduct and retain for their own use so much of the income tax upon that interest as is sufficient to recoup them the income tax paid by them, under Sched. A, upon the assessed annual value of the land occupied by them.

Judgment of Channell J., [1904] 2 K. B. 635, affirmed.

APPEAL from the judgment of Channell J. in favour of the defendants, reported [1904] 2 K. B. 635, upon the hearing of an information by the Attorney-General on behalf of His Majesty.

The information is set out fully in the report of the case in the Court below and disclosed the following facts. The annual income of the defendants, the London County Council, is derived from interest on loans to local authorities, and from rents of house property, and they are possessed of land which they themselves occupy. This land is assessed to the income tax under Sched. A at an annual value, in round numbers, of 118,000*l.* The defendants are entitled by statute to borrow

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money and to create a capital stock in respect thereof. The dividends on this stock are by statute charged upon all the lands, rents, and property of the defendants, including the land occupied by them. The annual interest upon the stock is greatly in excess of the annual income of the defendants and the annual value of the land occupied by them taken together. To meet this excess and for the purpose of redeeming the stock the defendants have statutory power to assess and raise a rate called the metropolitan consolidated rate. In paying interest to the holders of the stock the defendants deduct income tax. In *London County Council* v. *Attorney-General* (1) it was decided that so far as relates to the income derived by the defendants from interest on loans and from rents, all of which came into their hands less income tax, they are entitled to retain for their own benefit so much of the income tax deducted by them from the payments to the stockholders as was equivalent to, and would recoup to them, the amount of income tax deducted from the interest on loans and from the rents.

The question in this case was whether they are entitled to retain also for their own benefit an amount equivalent to the sum they had paid as income tax on the annual value of the land occupied by them and assessed under Sched. A.

The Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3, provides that, "Upon payment of any interest of money or annuities charged with income tax under Sched. D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge as the case may be, and such amount shall be a debt from such person to Her Majesty and recoverable as such accordingly."

(1) [1901] A. C. 26.

At the hearing of the information the learned judge gave judgment for the defendants. (1)

The Attorney-General on behalf of the Crown appealed.

June 1. *Sir R. B. Finlay, A.-G.*, and *Sir E. H. Carson, S.-G.* (*Rowlatt* with them), in support of the appeal. The effect of the last proviso in s. 102 of the Income Tax Act, 1842, and s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, is that in deducting income tax from payments to stockholders the defendants collect the money for the Crown and must account for it. There is an exception to this where the amount deducted is paid out of profits or gains "brought into charge." The fund from which the payments to stockholders is made consists partly of money raised by rates, in respect of which no tax is payable, and partly of interest on loans and rents.

The decision of the House of Lords in *London County Council* v. *Attorney-General* (2) established the right of the defendants to retain so much of the deduction from payments to stockholders as was equivalent to the deductions for tax from interest and rent made before those sums came into their hands, but that decision is entirely in favour of the Crown in the present case. The land in the occupation of the defendants brings in no revenue out of which the stockholders are paid, and, though as a matter of book-keeping the defendants attribute 118,000*l.* of the money in their hands to the occupation of the land, that does not alter the fact that the land produces nothing. No sum in relation to this land is "brought into charge," and if the defendants are entitled to retain from the amount deducted from stockholders a sum equivalent to the tax paid under Sched. A, the Crown will get no income tax in respect of the land occupied by them. The case is covered by the decision of the Court of Session in *Aberdeenshire Commissioners* v. *Russell* (3), where the commissioners were held to be liable to tax in respect of the property that they occupied under circumstances similar to those in this case.

(1) [1904] 2 K. B. 635. (2) [1901] A. C. 26.
(3) (1890) 17 R. 942; 2 Tax Cases, 643.

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Sir E. Clarke, K.C., and *Dickens, K.C.* (with them *Ryde*), for the county council. The decision in *Aberdeenshire Commissioners* v. *Russell* (1) is not in point, for in that case the borrowed money was not charged on the property occupied by the Commissioners. In this case the tax under Sched. A has been paid by the council, but the burden on the property exceeds its annual value, and unless the council can retain an equivalent out of the deductions from stockholders they will pay income tax twice over. In *London County Council* v. *Attorney-General* (2) Lord Davey pointed out that the real income of an owner of incumbered property is the annual income of the property charged less the interest on the incumbrance. In the case of a mortgagor in possession whose property is mortgaged to its full value so that no income is forthcoming, the mortgagor would retain for his own benefit the tax deducted on payment of interest. So here, if the council were receiving rent for this land, it is clear that they would be entitled to recoup themselves the tax deducted from the rent, and it makes no difference that they have not rent but beneficial occupation, for the fact remains that the incumbrance is greater than the value of the occupation.

Sir E. H. Carson, S.-G., in reply.

Cur. adv. vult.

June 8. COLLINS M.R. read the following judgment:—I do not think that there is any dispute as to the legal principles applicable to this case. The puzzle is one of arithmetic. The London County Council are in actual occupation of property, the annual value of which is 118,000*l.* The whole of their property, including that of which they are themselves in occupation, is charged with the payment of the Metropolitan Consolidated Stock, the annual interest on which far exceeds the annual value of all their property. The deficit has to be supplied out of the rates. The London County Council have been assessed to income tax under Sched. A in respect of the annual value of the property so occupied by the council themselves, and have duly paid it. They claim to retain an

(1) 17 R. 942; 2 Tax Cases, 643. (2) [1901] A. C. 26, at p. 42.

equivalent amount out of the sum deducted for income tax from the dividends paid to the holders of the Metropolitan Stock. The Crown disputes their right to such retention, and claims a sum of 5913*l.* Channell J. has decided against the Crown, who now appeals. The Crown contends that the case falls under the last proviso in s. 102 of the Income Tax Act, 1842, and is covered by the decision of the Court of Session in Scotland in *Aberdeenshire Commissioners* v. *Russell.* (1) It is said on behalf of the Crown that the interest in this case has been paid out of the rates, in respect of which no income tax has been paid, and there is therefore no more right in the council to keep in their own pockets the amount retained from the dividends than there was in the case cited, and that in both cases the public authority merely collected for the Crown, and cannot discharge themselves except as provided by s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, by shewing that the payment of interest was itself made out of profits or gains brought into charge, which in the circumstances they cannot do. The contention on the other side is that the case is distinguishable from *Aberdeenshire Commissioners* v. *Russell* (1), inasmuch as in that case the borrowed money, which represented the cost of the buildings assessed, was not charged upon the buildings, but only upon the rates, whereas here there is a charge upon the property itself for interest greatly exceeding its annual value; that in point of fact there was no taxable annual value in the property at all in their hands, inasmuch as the charge far exceeded the benefit enjoyed; and that therefore the council, in recouping themselves as they had done to the amount that they had been compelled to pay under Sched. A, could not be called upon to hand the sum back to the Crown, who had already received from them an equivalent sum under Sched. A, to which they had no right. It is clear from the decision of the House of Lords in *London County Council* v. *Attorney-General* (2) that income tax under Sched. A can be deducted as well as under Sched. D, and it is equally clear from s. 60, No. IV., r. 10, as explained by Lord Davey in that case, that the real income

(1) 17 R. 942; 2 Tax Cases, 643.

(2) [1901] A. C. 26.

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of an owner of incumbered property is the annual income of the property less the interest on the incumbrance, and that the Crown cannot demand the tax twice on the same income. It follows therefore that the Crown, having received income tax once under Sched. A on the full annual value of the property in question, can have no possible right to receive it a second time. It is true, as contended by the Crown and pointed out by Channell J., that the London County Council have in fact been obliged to find out of the rates the sum of 118,000*l.*, which is treated as the annual value of their occupation, and that in that sense the interest out of which income tax has been deducted has been paid out of a fund not "brought into charge" within s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888. But it was out of that fund that they had already paid the income tax assessed on them under Sched. A, and the substance of the matter is that there is no further sum due from them to the Crown. The appeal must be dismissed.

MATHEW L.J. I agree.

COZENS-HARDY L.J. I agree.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *W. A. Blaxland.*

A. M.

In re YOUNG, HAMILTON & CO. *Ex parte* CARTER.

1905
May 8, 22.

Bankruptcy—Traders—Bank Loan to purchase Goods—Letter of Lien on Goods — Construction—"Transfer of Goods in the ordinary course of Business"—Secured Creditors—Bill of Sale—Reputed Ownership—Order and Disposition—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

Bankers from time to time made advances to traders to enable them to purchase goods for shipment to the East. The course of business was for the traders to send the goods to bleachers to be bleached, and afterwards they were returned to the traders or sent to packers to be packed for shipment; and on the occasion of each advance the traders sent the bank a letter of lien accompanied by the bleachers' receipts for the goods. The letter was a printed form and (omitting formal parts and so far as material) was in these terms: "We beg to advise having drawn a cheque on you for £———, which amount please place to the debit of our loan account, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the under-mentioned goods in the hands of [here followed list of goods and names of bleachers] as per their receipt inclosed. These goods when ready will be shipped to Calcutta, and the bills of lading duly indorsed will be handed to you, and we then undertake to repay the above advance . . . ." On the bankruptcy of the traders:—

Held, that the letters of lien were not void, as being bills of sale not in the prescribed form and unregistered under the Bills of Sale Acts, but were "transfers of goods in the ordinary course of business of a trade or calling," and also "documents used in the ordinary course of business as proof of the control of goods," within the exceptions specified in s. 4 of the Bills of Sale Act, 1878, and that the bank were secured creditors.

A few days before the commencement of the bankruptcy the bank gave notice to the bleachers, whose receipts they held, claiming all the goods specified in such receipts, and the same day also gave notice to the traders claiming all the goods at the warehouses of the traders and in the hands of packers:—

Held, that the goods were not in the order and disposition of the traders as the reputed owners thereof within the meaning of s. 44 of the Bankruptcy Act, 1883.

THIS was a special case stated by the judge of the county court at Manchester under s. 97 of the Bankruptcy Act, 1883, for the opinion of the High Court under these circumstances.

The debtors were a mercantile firm at Manchester, and

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consisted of four partners. Two of the partners also traded in co-partnership at Calcutta under the style of Ewing & Co. The course of business between the two firms was as follows: Ewing & Co. in Calcutta from time to time gave the debtors prices which they were willing to pay for any particular goods which they required to be delivered to them c.i.f. in Calcutta. If the debtors saw that they could ship the required goods at a profit on the stated prices, their practice was to accept the offer of Ewing & Co. and to produce the goods by buying the grey cloth, causing it to be bleached and dyed (if dyeing was necessary), and then packed and shipped (carriage paid and insured) to Ewing & Co. at Calcutta. The difference between the price which Ewing & Co. had agreed to pay and the cost to the debtors of production and delivery made up the gain of the debtors. If the prices offered by Ewing & Co. were not high enough their orders were declined, and the debtors asked for better prices. The debtors were not bound to execute any orders given by Ewing & Co. For the purpose of obtaining, producing, and shipping as above mentioned, the debtors purchased in Manchester goods and had them prepared, packed, and shipped to Calcutta. The course of preparation of the goods for shipment was that the goods when purchased were sent to bleachers to be bleached, where they remained to the order of the debtors, and such of them as from time to time were required by the debtors for shipment to Ewing & Co. were delivered by the bleachers, in accordance with directions given them from time to time by the debtors, either to the warehouse of the debtors or to packers to be packed.

In order to obtain money with which to pay for the goods which they had purchased, the debtors from time to time used to obtain advances from the National Bank of India, Limited. The debtors had two accounts with the bank—a general account and a loan account—the latter account being called "loan account No. 2," and the course of business with the bank was as follows: The debtors from time to time, as they required to pay for goods purchased in Manchester for shipment, drew cheques on the bank, which were honoured by the bank, and as security for the advances thereby made the

debtors used to give the bank a letter of lien which (omitting formal parts) was in the following terms :—

"We beg to advise having drawn a cheque on you for £———, which amount please place to the debit of our loan account No. 2, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the undermentioned goods in the hands of [here followed list of goods and names of bleachers] as per their receipt inclosed. These goods when ready will be shipped to Calcutta, and the bills of lading duly indorsed will be handed to you, and we then undertake to repay the above advance either in cash or from the proceeds of our drafts on Messrs. Ewing & Co., Calcutta, to be negotiated by you and secured by the shipping documents representing the above-mentioned goods. But in no case is the advance to extend beyond two months from date hereof, unless by special arrangement, at the expiry of which we undertake to repay the same or any portion thereof then outstanding. Interest on this advance to be at the rate of 6 per cent. per annum. We undertake that the goods while in course of preparation for shipment shall be covered against fire risk under a general policy of assurance which we shall deposit with you."

Accompanying the letter of lien, the debtors gave to the bank the receipts of the bleachers for the goods specified in the letter. As soon as the debtors had in their hands ready for shipment to the East goods of a value at least equal to the amount of one of the cheques thus drawn upon and honoured by the bank, they invoiced and shipped the goods to Ewing & Co. in Calcutta, and handed to the bank a copy of the invoice and the bill of lading of the goods so shipped, together with a letter signed by them (called the shipment letter) and a trust receipt to be signed by Ewing & Co. in Calcutta, and also a letter of written instructions to the bank as to the disposal of the moneys representing the value of such goods. The shipment letter was addressed by the debtors to the bank and (omitting formal parts) was as follows :—

"Having this day received from you an advance of £———,

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bearing interest at 6 per cent. per annum, we hereby hand you as collateral security for the due repayment of such advance and interest, bills of lading, invoices, and policies of insurance for ——— packages per ——— to Calcutta, as described at the foot hereof, which documents are to be handed to your Calcutta agency.

"Our agreement is as follows:—

"Firstly, that on arrival of the documents in Calcutta they will be handed to Messrs Ewing & Co. by your agents, who will receive in exchange a formal lien over them and the goods they represent, and an undertaking to provide for fire insurance.

"Secondly, that within six months after the date of the above advance Messrs. Ewing & Co. will release the above documents referred to by delivering to your said agent a telegraphic transfer or demand draft on London for the equivalent amount of the said advance, together with interest at 6 per cent. per annum from date hereof, until approximate due date of arrival in London of such remittance. Your bank to have the preference at equal rates [then followed the particulars referred to]."

The effect of each transaction above described was intended by the parties to be a payment in reduction of the outstanding amounts secured by goods hypothecated to the bank. When goods had been shipped of a value sufficient to cover or partly cover the amount outstanding under a particular letter or particular letters of lien, the amount mentioned in the shipping letters and documents was allocated to such particular letter or letters of lien either as a payment in full or in part of the amounts due under such letter or letters of lien, as the case might be. In cases where the amount was allocated as part payment of the amount due under a letter of lien, it was the course of business that goods sufficient to secure both the undischarged balance and also the aggregate amount of all other letters of lien remained in the hands of the bleachers, or packers, or shippers, or in the warehouses of the debtors under lien to the bank.

The goods shipped were on arrival delivered into a special

godown rented by the bank, whose name appeared thereon and the keys whereof belonged to the bank and were in their possession. All such goods had been sold in Calcutta before arrival, and, under a verbal arrangement with Ewing & Co. in Calcutta, the bank allowed that firm to deliver such goods as the bank's agents to the purchaser, Ewing & Co. paying into the bank on the day after delivery the amount of the invoice value of such goods. The bank, after receipt of the letters of lien, had no information as to the movements of the goods between the bleachers, or the dyers, or the packers, and the debtors, nor as to whether the goods specified in the invoice and shipment letter and bill of lading corresponded wholly or partly with the goods specified in any letter of lien. All that the bank required was that the goods specified in the bill of lading, invoice, and shipment letters should be of a value sufficient to secure the bank in respect of the amount mentioned in the shipment letter. There was nothing in the shipping documents enabling the bank to identify the goods therein mentioned with the goods mentioned in the bleachers' receipts which accompanied the letters of lien.

In June and early in July, 1903, the debtors had given the bank letters of lien on goods belonging to them which had been placed with bleachers and dyers as security for advances made to them by the bank amounting to upwards of 5000*l.*, and the bleachers' receipts had been sent with the letters of lien to the bank; and on July 13 there were goods to a large amount in the hands of the bleachers and dyers.

On the same date other goods, which had been purchased by the debtors, were lying, partly in the warehouses of the debtors having been redelivered to them by the bleachers, and partly in the hands of packers having been delivered to the debtors by the bleachers and subsequently sent by the debtors to the packers to be packed.

On July 14, 1903, the bank, hearing that Ewing & Co. were in difficulties, wrote to the bleachers claiming all goods specified in the bleachers' receipts held by the bank; but the bank did not know at that time whether the goods specified in their letters were in the hands of the bleachers to whom they wrote.

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or what portion of them had been redelivered by such bleachers to the debtors, or to dyers or packers. On the same day the bank wrote the debtors claiming all goods held by bleachers or packers or the debtors against which the bank had outstanding advances made to the debtors. In August, 1903, the debtors were adjudicated bankrupts, but the title of the trustee in bankruptcy related back to an act of bankruptcy committed by the debtors on the previous July 24, which date was the commencement of the bankruptcy.

The bank claimed by virtue of their letters of lien to be secured creditors and to be entitled to all goods which on July 24 were in the hands of bleachers, or dyers or packers, or at the warehouses of the debtors. The trustee in bankruptcy contended that the letters of lien were bills of sale and, not being in the prescribed form and registered under the Bills of Sale Acts, were void; and also that the goods were in the order and disposition of the debtors with the consent of the true owners, the bank.

The questions for the Court were:—

1. Whether such of the goods specified in the letters of lien as on July 24 were in the hands of the bleachers were then subject to any charge or lien in favour of the bank, or whether the trustee in bankruptcy was entitled to such goods.

2. Whether the bank was entitled to such of the same goods as on that date were not in the hands of bleachers, but were then at the warehouses of the debtors, or were at the dyers, packers, or at the docks.

Hansell, for the trustee. First, the letter of lien is a bill of sale within s. 4 of the Bills of Sale Act, 1878 (1), and not being

(1) The Bills of Sale Act, 1878, s. 4, enacts that "the expression 'bill of sale' shall include assignments, transfers, declarations of trust without transfer, inventories of goods with receipt attached thereto, or receipts for purchase-money of goods, and other assurances of personal chattels . . . . authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred; but shall not include the following documents . . . . transfers of goods in

in the prescribed form and registered under the Bills of Sale Act, 1882, it is void. The words "we hold on your account and under lien to you" is a clear "declaration of trust without transfer" of the goods. It is also an "authority or licence to take possession of chattels as security for a debt": *Ex parte Parsons.* (1) It is also "an agreement by which a right in equity to personal chattels or to a charge or security thereon is conferred." The fact that charges given on imported goods are by the Bills of Sale Act, 1891 (54 & 55 Vict. c. 35), exempted from being deemed bills of sale within the meaning of the Bills of Sale Acts supports this view. Also, the letter of lien is not "a transfer of goods in the ordinary course of business of any trade or calling" within the exceptions in s. 4: *Tennant, Sons & Co.* v. *Howatson.* (2) It is not a pledge, nor is it a delivery of possession of the goods. It only confers a right to receive the proceeds of the goods. The respondents may rely on *Ex parte North Western Bank.* (3) But that is an old case under the Bills of Sale Act of 1854, and has been questioned. The facts here shew that until the shipment documents were handed to the bank they had neither the possession nor the control of the goods. Secondly, assuming that the bank were the true owners of the goods, they did nothing to determine the reputation of ownership by the debtors, except the letters written to the bleachers. No notice was given to the dyers or packers, and the letter of July 14 to the debtors did not demand possession of the goods.

Schiller, for the bank. The Legislature never intended commercial documents like this letter of lien to be bills of

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the ordinary course of business of any trade or calling, ... bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

(1) (1886) 16 Q. B. D. 532.

(2) (1888) 13 App. Cas. 489, 493-4.

(3) (1872) L. R. 15 Eq. 69.

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sale. If it did, bankers could not make advances on goods to traders, unless they were imported goods or goods at sea, because the document would have to be in the form required by the Act of 1882, and that would stop commercial business altogether. But the letter of lien is clearly within the exceptions in s. 4. It is "a transfer of goods in the ordinary course of business of any trade or calling," and it is also a document "used in the ordinary course of business of any trade or calling as proof of the possession or control of goods": *Ex parte Conning* (1); *Merchant Banking Company of London, Ld.* v. *Spotten.* (2) As to order and disposition, the goods never were in the reputed ownership of the debtors. The bank never consented to the debtors dealing with the goods except to the limited extent necessary to get them ready for shipment to the East. The goods were in the actual possession of the bleachers and packers, who had a lien on them for their work, and from the time the goods left the bleachers or packers the bank had the fullest possible control over them: *In re Watson.* (3) But if the goods were in the order and disposition of the debtors with the consent of the bank, that consent was determined by the letters of July 14.

Hansell, in reply, on the first point cited *Furber* v. *Cobb* (4); and on order and disposition referred to *In re Ginger.* (5)

Cur. adv. vult.

May 22. BIGHAM J. now delivered the following written judgment:—The real question in this case is whether the document by which these merchants, the bankrupts, purported to give a charge in favour of the bank is one which required to be registered as a bill of sale. If it is, the question submitted to the Court must be answered in favour of the trustee. The form of the document is set out in the special case. It is addressed by the bankrupts to the bank, and it states that the

(1) (1873) L. R. 16 Eq. 414.
(2) (1877) Ir. Rep. 11 Eq. 586, 609.
(3) [1904] 2 K. B. 753.
(4) (1887) 18 Q. B. D. 494.
(5) [1897] 2 Q. B. 461, 466.

money borrowed by the bankrupts from the bank is a "loan on the security of goods in preparation for shipment to the East." It also states that as security for the loan the bankrupts hold the goods on the bank's account and under lien to the bank. The goods are then particularized, and, finally, there is a statement that the receipts of the bleachers, in whose actual possession the goods for the time being are, are inclosed in the letter of hypothecation. This document evidences a transaction of a most ordinary kind as between bankers and merchants. Such transactions happen by the score every day of the week in places of business like Manchester. What is the real effect of it? No doubt the physical possession of the goods is in the bleachers, but for whom do they hold them? I think that by the intention of all parties they hold them for the bank. Such is clearly the intention of the bank and of the merchants, and such also is the intention of the bleachers, for they know well that business is done as it was done here—that their receipts are to be or may be used as the receipts were used in this case, and that they will be bound to hand the goods to the bank if required to do so. The document is, therefore, one which is accompanied by a transfer of possession of the goods. Thus the document comes within the exceptions mentioned in the 4th section of the Bills of Sale Act, 1878. It is a "transfer of goods in the ordinary course of business of a trade or calling." The document may also be described as one which is "used in the ordinary course of business as proof of the control of goods," and, as such, it would come within the exceptions. It is not necessary to consider whether the document comes within the definition of the expression "bill of sale" as contained in the 1st clause of the 4th section of the Act; the important question is, whether it comes within the exceptions. I am clearly of opinion that it does. Of the authorities cited during the arguments, it is sufficient to say that, so far as they are applicable to this case, they support the view I take. Another point was taken on behalf of the trustee. It was said that the goods were in the order and disposition of the bankrupts at the commencement of the bankruptcy. That is

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a question of fact, and there can be no doubt as to the answer to be given to it. The goods were no doubt the goods of the bank in the sense that they had a charge on them; but the bank never consented to the goods being in the order and disposition of the bankrupts in their trade or business, and certainly did not do so under such circumstances that the bankrupts became the reputed owners of the goods. The reasoning of Vaughan Williams L.J. in the case of *In re Watson* (1) applies and disposes of that contention. The questions submitted to the Court must be answered in favour of the bank. The trustee must pay the bank's costs, and will take his costs out of the estate.

Solicitors for trustee: *Chester & Co., for Bullock, Worthington & Co., Manchester.*

Solicitors for the bank: *Sanderson & Co.*

(1) [1904] 2 K. B. 753.

H. L. F.

WEST RAND CENTRAL GOLD MINING COMPANY, LIMITED *v.* THE KING.

1905 *May* 3, 4; *June* 1.

Petition of Right—International Law—Annexation—Liabilities of Conquered State—Creditor's Rights against Conqueror—Act of State—Jurisdiction of Municipal Courts.

A petition of right alleged that, before the outbreak of war between the late South African Republic and Great Britain, gold, the produce of a mine in the Republic owned by the suppliants, had been taken from the suppliants by officials acting on behalf of the Government of the Republic; that the Government by the laws of the Republic was liable to return the gold or its value to the suppliants; and that by reason of the conquest and annexation of the territorities of the Republic by Her late Majesty the obligation of the Government of the Republic towards the suppliants in respect of the gold was now binding upon His Majesty the King.

Held, on demurrer, that the petition disclosed no right on the part of the suppliants which could be enforced against His Majesty in any municipal Court.

There is no principle of international law by which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war.

PETITION OF RIGHT by the West Rand Central Gold Mining Company, Limited.

1. The suppliants are a company registered in England under the Companies Acts and owning and working a gold mine in His Majesty's Transvaal Colony.

2. On October 2, 1899, 283·90 ounces of gold of the value of 1104*l.*, the property of the suppliants, while in transit by train from Johannesburg to Cape Town, were taken possession of at Vereeniging by an official of the late South African Republic, namely, one Hugo, the resident magistrate of the district; the said Hugo was acting upon the instructions of the State Attorney of the said Republic, who ordered him to take the said gold into safe keeping.

3. The said Hugo gave for the said gold (together with other gold taken at the same time) a receipt of which the following is a translation:—

"Vereeniging Station.

"Seized this day by order of the Attorney-General S. A. R. (117) one hundred and seventeen cases containing gold and

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valuables sealed as usual and conveyed by the mail train from Johannesburg.

"(Signed) J. S. N. Hugo,
"Res. J. P."

"2 October, 1899."

4. Further, two bars of gold weighing 767·20 ounces of the value of 2700*l.*, the property of the suppliants, and being then in the custody of the African Banking Corporation of Johannesburg, were on October 9, 1899, taken possession of upon the premises of the said bank by two officials of the Government of the said Republic, namely, one Wagner and one Krause.

5. The said two officials gave for the said gold (together with other gold taken at the same time) a sealed receipt of which the following is a translation :—

"Received eight bars of raw gold weighing 2617·23 ounces, value 8996*l.*, namely :—

1.	M. K. C.	49	730·75 ozs.	
2.	M.	124	395·85 ,,	African Banking Corporation £4411.
3.	O. T. S.		125·10 ,,	
4.			39·35 ,,	
5.			19·00 ,,	
6.		215	539·03 ,,	o/a Worcester Exp^{n} & G. M. Co. £1885.
7.			149·55 ,,	o/a West Rand Central G. M. Co. £2700.
8.			617·65 ,,	
			2617·23 ,,	

From

African Banking Corporation, Limited,
Johannesburg.
(S^{d}) M. Wagner Mijn Inspecteur.
(S^{d}) F. E. T. Krause.

Government Commission of Peace and Order upon instructions of State Secretary.

Seal.

On behalf of the Government Commission, Witwatersrand, 10 October, 1899, S. A. R. Division of Peace and Order.

(S^{d}) Martin Mulder,
(S^{d}) Joseph Van Gelder, Secretaries."

6. The said gold was in each case taken possession of by and on behalf of and for the purposes of the then existing Government of the said Republic, and the said Government by the laws of the said Republic was under a liability to return the said gold or its value to your suppliants. None of the said gold has been returned to the suppliants, nor did the Government make any payment in respect thereof.

7. A state of war between Her late Majesty Queen Victoria and the said Republic commenced at 5 P.M. on October 11, 1899.

8. Her late Majesty's forces conquered the said Republic, and by a Proclamation in the name of Her late Majesty dated September 1, 1900, the whole of the territories of the said Republic were annexed to and became part of Her dominions, and the late Government of the said Republic thereby ceased to exist.

9. By reason of the said conquest and annexation Her late Majesty succeeded to the Sovereignty of the said Government with all its rights and duties and became entitled to the whole property of the said Government, and the obligation which vested in the said Government in respect of the said gold is now as binding upon His Majesty as though the acts and things which gave rise to such obligation had been done or suffered by Her late Majesty.

The suppliants therefore humbly pray the return of the said gold, or payment to them of the said sum of 3804*l.*

Demurrer: "His Majesty's Attorney-General on behalf of our Lord the King gives the Court here to understand and be informed that the petition of right is bad in substance and in law, in that it does not disclose a sufficient or lawful or any obligation on His Majesty towards the suppliants, or any legal or equitable right of the suppliants against His Majesty cognizable by the Courts of this country or enforceable therein and on other grounds sufficient in law to sustain this demurrer."

Joinder: "The petition herein is good in substance and in law."

S. R. Finlay, *A.-G.*, and *Sir E. Carson*, *S.-G.* (*H. Sutton* with them), for the Crown. The facts alleged in the petition

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of right disclose no obligation on the part of His Majesty towards the suppliants, nor any right enforceable in this Court. Where the Sovereign annexes a foreign country the terms on which he does so are settled by him, and no Court of law has any power to interpret or enforce those terms. *Cook* v. *Sprigg* (1) is the latest of a long series of authorities which shew that annexation is an act of State, and that the municipal Courts have no authority to enforce obligations assumed by the conquering State under the treaty of annexation.

[They referred to *Nabob of the Carnatic* v. *East India Co.* (2); *Elphinstone* v. *Bedreechund* (3); *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (4); *Ex Rajah of Coorg* v. *East India Co.* (5); *Sirdar Bhagwan Singh* v. *Secretary of State for India* (6); *Doss* v. *Secretary of State for India* (7); *Rustomjee* v. *Reg.* (8); *The Commonwealth* v. *Sparhawk* (9); *United States* v. *Pacific Railroad.* (10)]

To take an extreme case, if a conquering State confiscated all private property in the conquered State, the owners of the property could not obtain redress by means of litigation in the municipal Courts of the conquering State. So, in the present case, His Majesty's Government having declined to recognise the suppliants' claim, this Court has no power to adjudicate upon it. The claim is in fact absolutely without foundation. Assuming that the Transvaal Government were under some contractual obligation to indemnify the suppliants, that obligation does not as a result of the annexation fall upon His Majesty. There is no principle of international law by which a conquering State becomes ipso facto liable to discharge all the contractual obligations of the conquered State.

Lord R. Cecil, K.C., and *J. A. Hamilton, K.C.* (*Theobald Mathew* and *A. M. Talbot* with them), for the suppliants. For the purpose of this demurrer the facts must be taken to be as

(1) [1899] A. C. 572.
(2) (1791) 1 Ves. Jr. 371; 2 Ves. Jr. 56.
(3) (1830) 1 Knapp P. C. 316; 2 St. Tr. (N.S.) 379.
(4) (1859) 13 Moo. P. C. 22; 7 Moore's Ind. Ap. Ca. 476.
(5) (1860) 29 Beav. 300.
(6) (1874) L. R. 2 Ind. Ap. 38.
(7) (1875) L. R. 19 Eq. 509.
(8) (1876) 1 Q. B. D. 487; 2 Q. B. D. 69.
(9) (1788) 1 Dallas, 383.
(10) (1886) 13 Davis, 227.

stated in the petition, and the case may therefore be argued on the basis that the gold was taken by the Transvaal Government under its constitutional powers, that the seizure was not made for the purpose of hostilities, and that at the moment of annexation the Transvaal Government was under an enforceable obligation to return the gold or its value. The case for the suppliants may be put in the form of three propositions, the first of which is that by international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State, except liabilities incurred for the purpose of or in the course of the particular war. The writings of jurists on international law and stipulations in treaties are evidence of what is international law, and the proposition in question is supported by the following authorities: Hall's International Law, 5th ed. p. 99; Wheaton's International Law, 4th ed. p. 46; Halleck's International Law (Baker's 1878 ed.), vol. ii. p. 504; Calvo's Droit International, 4th ed. vol. i. p. 248; vol. iv. p. 404; Heffter's Droit International de l'Europe, 4th ed. pp. 63, 64; Huber's Die Staatensuccession, s. 217. Secondly, international law is part of the law of England. This question has been much considered in cases relating to the rights and privileges of ambassadors: see *Barbuit's Case* (1); *Triquet* v. *Bath* (2); *Heathfield* v. *Chilton* (3); *Viveash* v. *Becker* (4); cases dealing with the seizure of debts: see *Dolder* v. *Huntingfield* (5); *Wolff* v. *Oxholm* (6); and cases turning on the law as to territorial waters: see *Reg.* v. *Keyn.* (7) All these cases have been dealt with by the English Courts on the footing that the principles of international law relating to them form part of the common law of England. Thirdly, the English Courts have recognised and adopted the particular principle of international law enunciated above as the

(1) (1737) Cas. t. Tal. 281.
(2) (1764) 3 Burr. 1478.
(3) (1767) 4 Burr. 2016.
(4) (1814) 3 M. & S. 284; 15 R. R. 488.
(5) (1805) 11 Ves. Jr. 283; 8 R. R. 159.
(6) (1817) 6 M. & S. 92; 18 R. R. 313.
(7) (1876) 2 Ex. D. 63.

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first proposition: *Calvin's Case* (1); *Blankard* v. *Galdy* (2); *Campbell* v. *Hall.* (3) The Sovereign has, it is admitted, power when annexing a conquered State to impose what terms and conditions he pleases as to the taking over of the obligations of the conquered State; but if nothing is said about a particular obligation then it must be deemed to have been taken over, and it can be enforced in the municipal Courts of the conquering State. As soon as the annexation is complete the Sovereign's absolute power to impose terms and conditions is at an end, and the rights of the inhabitants of the conquered State must be recognised and dealt with in the same way as those of the other subjects of the Sovereign: *Advocate-General of Bombay* v. *Amerchund* (4); *Mayor of Lyons* v. *East India Co.* (5); *King of the Two Sicilies* v. *Willcox* (6); *United States of America* v. *Prioleau* (7); *United States* v. *McRae* (8); *Republic of Peru* v. *Peruvian Guano Co.* (9); *Republic of Peru* v. *Dreyfus* (10); *Frith* v. *Reg.* (11) The American authorities support the contention of the suppliants. In *United States* v. *Percheman* (12) Marshall C.J. said: "It is very unusual even in cases of conquest for the conqueror to do more than to displace the Sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled."

[They also referred to *Mitchel* v. *United States* (13); *Smith* v. *United States* (14); *Strother* v. *Lucas.* (15)]

With regard to *Cook* v. *Sprigg* (16), the facts there were so very different from those of the present case that it cannot

(1) (1609) 4 Coke, 1.
(2) (1693) 2 Salk. 411.
(3) (1774) 1 Cowp. 204.
(4) (1829) 1 Knapp P. C. 329, n.
(5) (1836) 1 Moo. P. C. 175; 43 R. R. 27.
(6) (1851) 1 Sim. (N.S.) 301.
(7) (1865) 2 H. & M. 559.
(8) (1869) L. R. 8 Eq. 69.
(9) (1887) 36 Ch. D. 489.
(10) (1888) 38 Ch. D. 348.
(11) (1872) L. R. 7 Ex. 365.
(12) (1833) 7 Peters, 51, at p. 86.
(13) (1835) 9 Peters, 711.
(14) (1836) 10 Peters, 326.
(15) (1838) 12 Peters, 410.
(16) [1899] A. C. 572.

be regarded as an authority. Moreover, in so far as *Cook* v. *Sprigg* (1) laid down the general propositions that conquest destroys all private rights, and that the repudiation of liability by a Government is an act of State which the Courts cannot inquire into, it is contrary to the authorities and to the principles of international law: see Pollock on Torts, 7th ed. pp. 108, 109; *Law Quarterly Review*, vol. xvi. pp. 1, 2.

The other cases relied on by the Crown are also not in point. They are cases where attempts were being made to enforce rights which had been the subject of treaties or agreements between two Sovereign Powers, or to recover property which had been seized by the armed forces of the Crown. The present case does not fall within either category. The suppliants are not seeking to set aside or interfere with the annexation, but they contend that one of the effects of the annexation has been to transfer from the Transvaal Government to the Crown the liability to indemnify the suppliants for the loss of their gold, and that the liability is one which can be enforced in this Court.

[In addition to the cases mentioned above, they also referred to *Walker* v. *Baird* (2) and *Raleigh* v. *Goschen*. (3)]

Sir R. B. Finlay, *A.-G.*, in reply. Text-writers on international law are not authoritative. The passages from their writings which have been quoted do not really support the first proposition put forward on behalf of the suppliants; they are mere general expressions of opinion, and not subject to the qualification, which the suppliants concede, that the proposition must be limited to liabilities incurred before war and not for the purpose of war. This concession is fatal to the authority of the passages relied on. The proposition is further qualified by the admission that a conquering State may by the terms of the annexation stipulate that certain liabilities will not be taken over, but it is said that all liabilities not expressly excepted are taken over. It cannot be seriously contended that the absence from Lord Roberts' proclamation of a schedule of excluded debts saddles the British Government with liability

(1) [1899] A. C. 572. (2) [1892] A. C. 491.
(3) [1898] 1 Ch. 73.

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for all the debts of the Transvaal Government, and no authority has been or can be produced to support this contention. Moreover, there are passages in Huber's Staatensuccession, at pp. 65, 66, 114, 115, which shew that his views on this point would have been very much qualified if his mind had really been addressed to the question as it arises in this case. The proposition of the suppliants further involves an unlimited liability on the part of the conquering State—a liability "without benefit of inventory." The passages cited from Hall, Halleck and Heffter do not support this view, but on the contrary rather go to shew that in the opinion of these writers the liability of the conquering State does not extend beyond the amount of the assets taken over; but the text-books are not in agreement on this point: see Westlake's International Law, Part. I. p. 76. The cases cited for the Crown establish beyond all doubt that international law is not part of the common law of England, and that the claims of the suppliants cannot be enforced by petition of right. Decisions as to ambassadors and territorial waters are beside the question; they are ex necessitate cases, for neither ambassadors' privileges nor territorial waters could be said to exist if they were not recognised and enforced in Courts of law.

Cur. adv. vult.

June 1. The judgment of the Court (Lord Alverstone C.J., Wills and Kennedy JJ.) was read by

LORD ALVERSTONE C.J. In this case the Attorney-General, on behalf of the Crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. The petition of right alleged that two parcels of gold, amounting in all to the value of 3804*l.*, had been seized by officials of the South African Republic—1104*l.* on October 2 in course of transit from Johannesburg to Cape Town, and 2700*l.* on October 9, taken from the bank premises of the petitioners. No further statement was made in the petition of the circumstances under which, or the right by which, the Government of the Transvaal

Republic claimed to seize the gold; but it was stated in paragraph 6, "That the gold was in each case taken possession of by, and on behalf of, and for the purposes of, the then existing Government of the said Republic, and that the said Government, by the laws of the said Republic, was under a liability to return the said gold, or its value, to your suppliants. None of the said gold has been returned to your suppliants, nor did the said Government make any payment in respect thereof." The petition then alleged that a state of war commenced at 5 P.M. on October 11, 1899, that the forces of the late Queen conquered the Republic, and that by a Proclamation of September 1, 1900, the whole of the territories of the Republic were annexed to, and became part of, Her Majesty's dominions, and that the Government of the Republic ceased to exist. The petition then averred that by reason of the conquest and annexation Her Majesty succeeded to the sovereignty of the Transvaal Republic, and became entitled to its property; and that the obligation which vested in the Government was binding upon His present Majesty the King.

Before dealing with the questions of law which were argued before us, we think it right to say that we must not be taken as acceding to the view that the allegations in the petition disclosed a sufficient ground for relief. The petition appears to us demurrable for the reason that it shews no obligation of a contractual nature on the part of the Transvaal Government. For all that appears in the petition the seizure might have been an act of lawless violence. The allegations that A. seized property belonging to B., and that thereupon by law an obligation arose on the part of A. to return to B. his property, or pay its value, might be truly made in respect of any wrongful seizure of A.'s property. We do not assent to the proposition of Lord Robert Cecil that it is sufficient to allege what may be a ground of action if something else be added which is not stated. Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action, and unless the obligation alleged in the present instance arose out of contract it is clear that no petition of right could be maintained. A passage in the judgment of Willes J. in the

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case of *Gautret* v. *Egerton* (1) states this view so clearly that we think it well to quote it. Willes J. says: "The argument urged on behalf of the plaintiffs, when analyzed, amounts to this, that we ought to construe the general words of the declaration as describing whatever sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover secundum allegata et probata. What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged." I need scarcely add that in dealing with a petition of right, which must be based upon contract, that observation would of course have its full force and effect. The discussion, however, is academical, as the Attorney-General for the Crown, as well as Lord Robert Cecil for the suppliants, desired that we should deal with the case as if any necessary amendment had been made, and decide the question whether all the contractual obligations of a State annexed by Great Britain upon conquest are imposed as a matter of course, and in default of express reservations, upon Great Britain, and can be enforced by British municipal law against the Crown in the only way known to British municipal law, that is by a petition of right. We have no hesitation in answering this question in the negative, but, inasmuch as it is one of great importance, and we have had the advantage of hearing very able argument upon both sides, we think it right to give our reasons in some detail.

Lord Robert Cecil argued that all contractual obligations incurred by a conquered State, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. He could not indeed do otherwise, for it is clear that if any distinction is to be made it must be made upon grounds which, without depriving the original liability of its character of a legal obligation against the vanquished State, make it inexpedient for

(1) (1867) L. R. 2 C. P. 371.

the conquering State to adopt that liability as against itself; in other words, upon ethical grounds, into which enter considerations of propriety, magnanimity, wisdom, public duty, in short, of policy, in the broadest and widest sense of the word. It is equally clear that these are matters with which municipal Courts have nothing to do. They exist for the purpose of determining and enforcing legal obligations, not for the purpose of dividing them into classes, and saying that some of them, although legally binding, ought not to be enforced. The broad proposition which thus formed the basis of Lord Robert Cecil's argument almost answers itself, for there must have been, in all times, contracts made by States before conquest such as no conqueror would ever think of carrying out. Some illustrations will occur in the course of our subsequent remarks. For the moment we will pursue Lord Robert's argument into further detail. His main proposition was divided into three heads. First, that, by international law, the Sovereign of a conquering State is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State.

In support of his first proposition Lord Robert Cecil cited passages from various writers on international law. In regard to this class of authority it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase "international law"), rests upon a consensus of civilized States, not expressed in any code or pact, nor possessing, in case of dispute, any authorized or authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could

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be shewn to exist. Perhaps it is in regard to the extra-territorial privileges of ambassadors, and in regard to the system of limits as to territorial waters, that it is least open to doubt or question. The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations inter se, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, "law." The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our Courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition, that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that although the Sovereign when making peace may limit the obligations to be taken over, if he does not do so they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred, and what debts should in foro

conscientiæ be assumed. There must also be many contractual liabilities of the conquered State of the very existence of which the superior Power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent State, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general State expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how particular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared.

Turning now to the text-writers, we may observe that the proposition we have put forward that the conqueror may impose what terms he thinks fit in respect of the obligations

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of the conquered territory, and that he alone must be the judge in such a matter, is clearly recognised by Grotius: see "War and Peace," book iii. chap. 8, s. 4, and the Notes to Barbeyrac's edition of 1724, vol. ii. p. 632. For the assertion that a line is to be drawn at the moment of annexation, and that the conquering Sovereign has no right at any later stage to say what obligations he will or will not assume, we venture to think that there is no authority whatever. A doctrine was at one time urged by some of the older writers that to the extent of the assets taken over by the conqueror he ought to satisfy the debts of the conquered State. It is, in our opinion, a mere expression of the ethical views of the writers; but the proposition now contended for is a vast extension even of that doctrine. It has been urged that in numerous cases, both of peace and of cession of territories, special provision has been made for the discharge of obligations by the country accepting the cession or getting the upper hand in war; but, as we have already pointed out, conditions the result of express mutual consent between two nations afford no support to the argument that obligations not expressly provided for are to follow the course, by no means uniform, taken by such treaties. See as to this, s. 27 of the 4th edition of Hall's International Law, and the opinion of Lord Clarendon there cited. Lord Robert Cecil cited a passage from Mr. Hall's book, 4th ed. p. 105, in which he states that the annexing Power is liable for the whole of the debts of the State annexed. It cannot, however, be intended as an exhaustive or unqualified statement of the practice of nations, whatever may have been the opinion of the writer as to what should be done in such cases. It is not, in our opinion, directed to the particular subject now under discussion. The earlier parts of the same chapter contain passages inconsistent with any such view. We would call attention particularly to s. 27 on pp. 98 and 99 of the 4th edition, where the question as to the extent to which obligations do not pass is discussed, and the passage on pp. 101 and 102, referring to the discussion between England and the United States in 1854, in which Lord Clarendon's contention that Mexico did not inherit the obligations or rights of Spain

is approved of by Mr. Hall. In the same way the passage from Halleck, s. 25 of chap. 34 (Sir Sherston Baker's edition of 1878), cited by Lord Robert Cecil, cannot be construed as meaning to lay down any such general proposition. It is cited from a chapter in which other sections contain passages inconsistent with the view that the legal obligation to fulfil all contracts passed to the conquering State. The particular section is in fact directed to the obligations of the conquering or annexing State upon the rights of private property of the individual—the point which formed the subject of discussion in the American cases upon which the suppliants relied and with which we shall deal later on. The passage from Wheaton (Atlay's ed. p. 46, s. 30) shews that the writer was only expressing an opinion respecting the duty of a succeeding State with regard to public debts, and, as the note to the passage shews, it is really based upon the fact that many treaties have dealt with such obligations in different ways. We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be called international common law. We have not had the opportunity of referring to the edition of Calvo, cited by Lord Robert Cecil, but the sections of the 8th book of the edition published in 1872 contain a discussion as to the circumstances under which certain obligations should be undertaken by the conquering State. The distinction between the obligations of the successor with regard to the private property of individuals on the one hand, and the debts of the conquered State on the other, is clearly pointed out, and paragraphs 1005 and 1010 are quite inconsistent with any recognition by the author of the proposition contended for by the suppliants. The same observations apply to Heffter, another work upon which reliance was placed. As regards Max Huber's work on State Succession, published in 1898, there is no doubt, as appears from Mr. Westlake's recent book on international law, published last year, and from other criticisms, that Huber does attempt to press the duty of a succeeding or conquering State to recognise the obligations of its predecessor to a greater extent than previous writers on international law, but the extracts cited by the Attorney-

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General in his reply and other passages in Huber's book shew that even his opinion falls far short of the proposition for which the suppliants contend. But whatever may be the view taken of the opinions of these writers, they are, in our judgment, inconsistent with the law as recognised for many years in the English Courts; and it is sufficient for us to cite the language of Lord Mansfield in *Campbell* v. *Hall* (1) in a passage the authority of which has, so far as we know, never been called in question: "It is left by the Constitution to the King's authority to grant or refuse a capitulation. . . . If he receives the inhabitants under his protection and grants them their property he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion." And so, much earlier, in the year 1722 (2nd Peere Williams, p. 75), it is said by the Master of the Rolls to have been determined by the Lords of the Privy Council that "where the King of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases." References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the State accepting the cession was referred to. They may be dismissed in a sentence. The considerations which applied to peaceable cession raise such different questions from those which apply to conquest that it would answer no useful purpose to discuss them in detail.

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to

(1) 1 Cowp. 204, at p. 209.

which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case* (1), *Triquet* v. *Bath* (2), and *Heathfield* v. *Chilton* (3) are cases in which the Courts of law have recognised and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when

(1) Cas. t. Tal. 281.

(2) 3 Burr. 1478.

(3) 4 Burr. 2016.

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dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her Courts. The cases of *Wolff* v. *Oxholm* (1) and *Rex* v. *Keyn* (2) are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering State is bound by the obligations of the conquered can be enforced by petition of right. It is the consideration of this part of the case which brings out in the strongest relief the difficulties which exist in the way of the suppliants. It is not denied on the suppliants' behalf that the conquering State can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering State would by annexation take upon itself, as, for instance, obligations to repay money used for the purposes of the war. We asked more than once during the course of the argument by what rule, either of law or equity, which could be applied in municipal Courts could those Courts decide as to the obligations which ought or ought not to be discharged by the conquering State. To refer again to the instance given in the commencement of this judgment—the obligation incurred by the conquered State by which their credit has been ruined may have been contracted for insufficient consideration or under circumstances which would make it perfectly right from every point of view for the conquering State to repudiate it in whole or in part. No answer was, or could be, given. Upon this part of the case there is a series of authorities from the year 1793 down

(1) 6 M. & S. 92; 18 R. R. 313. (2) 2 Ex. D. 63.

to the present time holding that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal Courts, and that rights supposed to be acquired thereunder cannot be enforced by such Courts. It is quite unnecessary to refer in detail to them all. They extend from *Nabob of the Carnatic* v. *East India Co.* (1) down to *Cook* v. *Sprigg*. (2) As a great deal of argument was addressed to us upon the latter case, we think it right to say that, although it was contended that the actual decision was not in harmony with the views of the American Courts upon analogous matters, no authority was cited, or, as far as we know, exists, which throws any doubt upon that part of the judgment which is in the following words: "The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent Sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the Sovereign which accepts the cession and assumes the duties and legal obligations of the former Sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of Sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation." We do not repeat the citations of *Secretary of State for India* v. *Kamachee* (3) and *Doss* v. *Secretary of State for India* (4), referred to in the judgment in *Cook* v. *Sprigg*. (2) They form part of the chain of authorities to which we have referred, and we observe in passing that we are not to be considered as throwing any doubt upon the correctness of the decision itself in *Cook* v. *Sprigg*. (2) The case of *Rustomjee* v.

(1) 1 Ves. Jr. 371; 2 Ves. Jr. 56.
(2) [1899] A. C. 572.
(3) 13 Moo. P. C. 22.
(4) L. R. 19 Eq. 509.

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Reg. (1), affirmed in the Court of Appeal, deserves, however, one word of comment. There the British Government had received from the Chinese Government a sum of money in respect of certain claims made upon that Government by persons, of whom the petitioner was one. A petition of right was brought in order to enforce payment by our Government of those claims out of the sum so received by the British Government. From some points of view that case may be considered much stronger in favour of the suppliant than the present, the money having been received by the Crown under a treaty specifically on account of the debts due to British subjects. In delivering the judgment of the Court of Appeal, Lord Coleridge used language which has a strong bearing on the present case. He said (2): "The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts." It was contended by Lord Robert Cecil that the view we are taking was inconsistent with certain American decisions and with certain decisions of our own Court of Chancery, to which we think it right to refer. A careful examination of these cases satisfies us that rightly understood no such inconsistency exists. The American cases were a series of decisions of the Supreme Court of the United States respecting the rights of the owners to landed property in territories formerly forming part of independent countries which had been ceded to or annexed by the United States. The particular cases cited were *United States* v. *Perchcman* (3), *Mitchell* v. *United States* (4), *Smith* v. *United States* (5), and *Strother* v. *Lucas*. (6) These cases arose respecting the rights of landed property in Florida, Louisiana, and Missouri. They

(1) 1 Q. B. D. 487; 2 Q. B. D. 69.
(2) 2 Q. B. D. at p. 73.
(3) 7 Peters, 51.
(4) 9 Peters, 711.
(5) 10 Peters, 326.
(6) 12 Peters, 410.

were all cases of cession, and in all of them the treaties of cession and subsequent legislation of the United States protected the rights of owners of private property as they existed at the time of cession, and the sole question was whether, under the circumstances of each individual case, private rights of property existed and could be enforced as against the United States. No question of duty of the country, to whom the territory passed, of fulfilling the obligations of the original country in any other respect arose; and the language of Marshall C.J. (1) and of Baldwin J. (2), all of which is to the same effect, must be construed solely with reference to the rights of private property in individuals, such property being locally situated in a country annexed by another country. We asked Lord Robert Cecil and Mr. Hamilton whether they had been able to find any case in which a similar principle had been applied to personal contracts or obligations of a contractual character entered into between a ceding or conquered State and private individuals. They informed us that they had not been able to do so, nor do we know of any such case. It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered State towards individuals is to be undertaken by the conquering State. The English cases on which reliance was placed were *United States* v. *Prioleau* (3), in which a claim was made by the United States Government to cotton which had been the property of the Confederated States; *United*

(1) 7 Peters, at p. 86. (2) 9 Peters, at p. 733; 10 Peters, at p. 329.
(3) 2 H. & M. 559.

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States v. *Macrae* (1), which recognised the right of the Government suppressing rebellion to all moneys, goods, and treasures which were public property at the time of the outbreak: *Republic of Peru* v. *Peruvian Guano Co.* (2) and *Republic of Peru* v. *Dreyfus.* (3) The only principle, however, which can be deduced from these cases is that a Government claiming rights of property and rights under a contract cannot enforce those rights in our Courts without fulfilling the terms of the contract as a whole. They have, in our judgment, no bearing upon the propositions which we have been discussing. We are aware that we have not commented upon all the cases which were cited before us—we have not failed to consider them; and any arguments which could be founded upon them seem to us to be covered by the observations already made. We are of opinion, for the reasons given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against His Majesty in this or in any municipal Court; and we therefore allow the demurrer, with costs.

Judgment for the Crown.

Solicitors for suppliants: *Waltons, Johnson, Bubb & Whatton.*

Solicitor for the Crown: *Solicitor to the Treasury.*

(1) L. R. 8 Eq. 69. (2) 36 Ch. D. 489.
(3) 38 Ch. D. 348.

F. O. R.

[IN THE COURT OF APPEAL.]

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May 31;
June 8.

EAST INDIAN RAILWAY COMPANY *v.* SECRETARY OF STATE IN COUNCIL OF INDIA.

Revenue — Income Tax — Annuity — Sale of Railway — Purchase-money — Payment by Annual Instalments with Interest — Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35) *and* 1853 (16 & 17 *Vict. c.* 34), *Scheds. C and D.*

The East India Company were, under contracts made between them and the plaintiff company, entitled to purchase three railways belonging to the plaintiff company at certain dates respectively for gross sums to be ascertained as therein provided, the East India Company having an option, instead of paying the gross sum, of paying for the railway by means of what was described as an "annuity" to be paid to the plaintiff company for a term of years. The rights of the East India Company under these contracts subsequently became vested in the defendant. When the defendant's right of purchase accrued as regards two of the railways, but before it accrued as regards the third railway, an arrangement was made between the plaintiff company and the defendant for the purchase by the defendant of the three railways simultaneously, in consideration of an annuity for a term of years calculated at the rate of 5*l.* 12*s.* 6*d.* per annum for every 100*l.* of the plaintiff company's stock commuted at 125*l.* This amount of 5*l.* 12*s.* 6*d.* was stated in an Act of Parliament confirming the arrangement to have been arrived at on the basis of 5*l.* 7*s.* 6*d.*, part thereof, being interest at the rate of 4*l.* 6*s.* per cent. per annum on the said amount of 125*l.*, and of a sum of 5*s.*, other part thereof, being the amount required to be set aside and invested half-yearly in every year at a like rate of interest in order to produce by means of a sinking fund the capital sum of 125*l.* or thereabouts at the end of the term for which the annuity was payable. On payment of the annuity income tax had been deducted by the defendant in respect of the whole of the annual payment. The plaintiffs contended that the deduction should only have been of income tax in respect of so much of the payment as represented interest on unpaid capital in accordance with the decision in *Secretary of State in Council of India* v. *Scoble*, [1903] A. C. 299:—

Held, that the fact that the purchase of the railways had been carried out by agreement, before the date at which the defendant's right of purchase accrued as regards one of the railways, did not constitute a valid legal distinction between the present case and *Secretary of State in Council of India* v. *Scoble*, [1903] A. C. 299, and that the plaintiffs' contention was correct:

Held, further, that it was not correct to treat the before-mentioned

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statement in the Act of Parliament as indicating what proportions of the annual sum were respectively payable in respect of capital and of interest on unpaid capital.

APPEAL by the plaintiffs from the judgment of Jelf J. in an action tried by him without a jury, and cross-appeal by the defendant.

The action was brought to recover certain amounts which had been deducted by the defendant in respect of income tax from certain sums payable half-yearly by the defendant to the plaintiffs; and for a declaration that, the sums so payable being partly instalments of the price payable by the defendant for the plaintiffs' railways, and therefore in the nature of capital, and partly interest on the unpaid part of that price, so much of the sums so payable as represented capital was not liable to income tax.

The East Indian Railway Company was incorporated by Act of Parliament in 1849. By an indenture dated August 17, 1849, and made between the East India Company and the plaintiffs, it was agreed that the plaintiffs should, upon certain terms arranged between the East India Company and the plaintiffs, construct a railway from Calcutta, or a place within ten miles of Calcutta, as therein described, on land to be provided by the East India Company, and that that company should grant a lease to the plaintiffs of, or otherwise secure to them a title to, the land so provided for a term of ninety-nine years terminable as therein mentioned; and by certain clauses therein (since superseded by the provisions of a later indenture dated February 15, 1854) the East India Company were to be entitled to purchase the railway at certain times and on certain conditions therein mentioned. By an indenture dated February 15, 1854, and made between the same parties, it was, amongst other things, agreed that the plaintiffs should upon similar terms construct an extension of the first-mentioned railway to Delhi, upon land to be provided by the East India Company, and that that company should grant to the plaintiffs a lease of, or otherwise secure to them a title to, the land provided under that contract as well as that provided under the contract of 1849 for a term of ninety-nine years from February 15, 1854. This last-mentioned indenture contained a

provision in clause 22 that at any time within six calendar months after the expiration of the first twenty-five years of the said term of ninety-nine years it should be lawful for the East India Company to give notice to the plaintiffs of their intention to purchase the said railways and works, together with the engines, rolling stock, &c., and thereupon, at the half-yearly day next but one following such notice, the land and the railway thereon, including the first-mentioned railway, should revert to and become the property of the East India Company as the owners thereof by purchase on account of the Government of India, and that the East India Company should be bound to pay in London on the said half-yearly day for the purchase of all the said premises the full amount of all the value of all the shares or capital stock in the plaintiffs' company as issued or created for the purposes of the contracts of 1849 and 1854, calculated according to the mean market value in London of such shares or stock respectively during the three years immediately preceding the expiration of the said period of twenty-five years; and by clause 25 of the contract it was provided that in every or any case in which, under the provisions therein contained, the East India Company should become bound to repay the capital expended by the railway company, or to pay for the purchase of the said railway, works, and stock before the expiration of the term of ninety-nine years, it should be lawful for the East India Company, instead of paying a gross sum of money in respect of the premises, to declare by notice to the company in London their option to pay an annuity to be reckoned from the time when the gross amount would be payable, and to continue during the residue of the said term of ninety-nine years, and that in that case such annuity should be payable in London on such two half-yearly days in the year as should be selected by the East India Company in that behalf with a fractional part for any broken half-year, and that the rate of interest which should be used in calculating such annuity should be determined by the average rate of interest during the preceding two years received in London upon public obligations of the East India Company, and which should be ascertained by reference to the governor

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or deputy-governor of the Bank of England for the time being. By an indenture dated April 21, 1858, between the same parties, it was, amongst other things, agreed that the plaintiffs should construct another line of railway, from Mirzapore to Jubbulpore, upon land to be provided by the East India Company, and that that company should grant to the plaintiffs a lease of, or otherwise secure to them a title to, the land so provided for a term of ninety-nine years from April 21, 1858. The terms of that contract were similar to those provided in the case of the two first-mentioned railways, save that the period of twenty-five years dated from April 21, 1858. All the railways were duly completed. By the Government of India Act, 1858 (21 & 22 Vict. c. 106), all the powers and rights of the East India Company under the before-mentioned contracts became vested in the Secretary of State in Council of India. Shortly before the end of the period of twenty-five years mentioned in the contract of February 15, 1854, namely, on November 1, 1878, the defendant made a proposal by letter for the purchase of the two first-mentioned railways, and also of the last-mentioned railway, although the time for the exercise of the right to purchase that railway would not arrive till April 21, 1883. The letter inclosed a memorandum of the proposed terms of purchase. The letter and the memorandum so far as material are set out in the judgment of the Court. The proposal was that the purchase of the railways should be made by means of an annuity to commence January 1, 1880, and terminable on February 14, 1953, calculated on a rate of interest of 4*l.* 6*s.* per cent. on a commuted price of 125*l.* per 100*l.* of capital stock, which gave, including 4*s.* for redemption of capital, an annuity of 5*l.* 12*s.* 6*d.* for each 100*l.* of capital stock so commuted at 125*l.* (1) The plaintiffs accepted the proposal, and the agreement so arrived at was sanctioned by the East Indian Railway Company Purchase Act, 1879

(1) There were other terms of a complicated nature providing for the continuance of the management of the railway by the plaintiff company and the retention of a proportion of the annuity for a term of years by the defendant, the plaintiff company receiving interest thereon together with a share of profits. For the purposes of this report it is not conceived that the details of those terms are material, and therefore they are not set forth.

(42 & 43 Vict. c. ccvi.), which recited (inter alia) the proposal and memorandum of terms, and also recited that "in the said memorandum of terms the amount of the annuity of 5*l.* 12*s.* 6*d.*, into which every 100*l.* stock of the company is intended to be commuted at a price of 125*l.*, is calculated on the basis of 5*l.* 7*s.* 6*d.*, part thereof, being interest at the rate of 4*l.* 6*s.* per centum per annum on the said amount of 125*l.*, and of a sum of 5*s.*, other part thereof, being the amount required to be set aside and invested half-yearly in every year at a like rate of interest from the 1st day of January, 1880, up to the 14th day of February, 1953, in order to produce by means of a sinking fund the capital sum of 125*l.*, or thereabouts, on the said 14th day of February, 1953." The Act then enacted provisions for carrying out the contract for purchase, including a provision for the payment of an annuity in accordance with the before-mentioned terms by the Secretary of State, charged on the revenues of India, which was to be payable to the plaintiffs and by them distributed among the stockholders. The Secretary of State had deducted income tax upon the amount of the annuity. The plaintiffs claimed to recover the amount of the deductions for two half-years which had been made the subject of protest by the plaintiffs, in so far as they were made in respect of such portion of the annuity as was paid on account of capital. Jelf J. decided on the authority of *Secretary of State in Council of India* v. *Scoble* (1) that, the annuity payable for the purchase of the railways representing in part payment of capital by instalments, the plaintiffs were entitled to the declaration which they claimed, and he gave judgment accordingly, with liberty to either party to apply as to the amount recoverable or otherwise. The case came before the learned judge again in pursuance of the liberty to apply. The contentions then raised by the parties respectively were as follows: The plaintiffs contended that of the half-yearly payments made from time to time the proportion representing capital and therefore not taxable was continually increasing, while the proportion representing interest and therefore taxable was continually decreasing,

(1) [1903] A. C. 299.

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inasmuch as every half-year there was less of the total capital unpaid, and therefore the interest on the unpaid capital was less. The defendant, on the other hand, contended that the interest payable each half-year was a constant unvarying amount treated as though the payment of the whole capital were postponed for seventy-three years, the remaining part of the annuity payable each half-year representing capital repaid only in the sense that it was a constant unvarying amount calculated to produce a sinking fund, which, if invested at compound interest at the specified rate, would replace the whole capital at the end of seventy-three years.

The two following tables shew the contentions of the plaintiffs and defendant respectively as applied to the amount of income tax wrongly deducted to be refunded for the two half-years in respect of which the deductions were made subject to the protest of the plaintiffs :—

PLAINTIFFS' CONTENTION.

1.	2.	3.	4.	5.	6.
Half-year ending	Total annuity payable.	Amount payable on account and as part of capital.	Amount payable as interest on capital unpaid.	Rate of Income Tax.	Amount to be refunded, having been allowed to be deducted under protest, being Income Tax on Col. 3.
	£ s. d.	£ s. d.	£ s. d.	s. d.	£ s. d.
1903. Mar. 31	424,545 11 11	49,672 1 5	374,873 10 6	1 3	3,104 10 1
„ Sept. 30	424,545 11 11	50,740 0 5	373,805 11 6	0 11	2,325 11 8
					5,430 1 9

DEFENDANT'S CONTENTION.

1.	2.	3.	4.	5.	6.
Half-year ending	Total annuity payable.	Amount payable towards sinking fund.	Interest on whole capital.	Rate of Income Tax.	Amount to be refunded, having been allowed to be deducted under protest, being Income Tax on Col. 3.
	£ s. d.	£ s. d.	£ s. d.	s. d.	£ s. d.
1903. Mar. 31	424,545 11 11	18,868 13 10	405,676 18 1	1 3	1,179 5 11
„ Sept. 30	424,545 11 11	18,868 13 10	405,676 18 1	0 11	864 16 4
					2,044 2 3

The learned judge gave judgment in favour of the defendant's contention, holding, therefore, that to the extent of 5*l.* 7*s.* 6*d.* per 100*l.* of stock the annual payment represented interest, and to the extent of 5*s.* it represented capital.

The plaintiffs appealed against the last-mentioned judgment of the learned judge, and the defendant gave notice by way of cross-appeal.

Cripps, K.C., and *T. T. Paine*, for the plaintiffs. With regard to the first point decided by the learned judge, this case is covered by the decision of the House of Lords in the case of *Secretary of State in Council of India* v. *Scoble* (1), and his judgment is therefore correct. What was there decided was that, though an annual payment under a contract such as that in the present case was called an "annuity," it was not really an annuity in the sense in which that term is used in the Income Tax Acts, but a repayment of capital by instalments together with interest on the capital from time to time remaining unpaid. In the case of an annuity properly so called, the purchaser of the annuity parts with so much capital for good in return for income, either for so many years or in perpetuity, and the taxation of the whole income, therefore, does not involve the taxation of capital. The principle on which the case of *Secretary of State in Council of India* v. *Scoble* (1) was decided is that the payment of the price of a railway by such an annuity as that in question in its essence involves a repayment of capital by instalments. It cannot make any real difference between that case and the present that the parties in this case by agreement anticipated the time at which by the original contract the defendant was entitled to purchase the third railway. In both cases there was an agreement for the purchase of the railway for a lump sum or, at the option of the defendant, in consideration of a terminable annuity in lieu of that lump sum. In each case the lump sum due for the price has to be ascertained in the first instance, and then an option is given to the purchaser, instead of paying that sum down, to pay by instalments by means of what is called an annuity. It

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makes no difference whether the purchase takes place at the time fixed by the original contract or that time is varied by subsequent agreement. The defendant in this case is really attempting to go back on the decision of the House of Lords in *Secretary of State in Council of India* v. *Scoble*. (1)

With regard to the second point decided by the learned judge, it is submitted that in principle that point is also covered by the decision in *Secretary of State in Council of India* v. *Scoble*. (1) The calculation set out in the "Memorandum of terms," and recited in the confirming Act, only indicates the mode in which the amount of the annual payment to be made was arrived at, and cannot control the application to this case of the principle laid down in *Secretary of State in Council of India* v. *Scoble*. (1) That calculation was made no doubt on the principle on which the purchase price of a terminable annuity is according to actuarial practice ordinarily calculated. It treats the capital as remaining unpaid till the end of the period for which the annuity is created, and indicates the sum which must be added to the ordinary rate of interest on that capital and set aside out of the annuity and invested, in order as nearly as possible to replace the capital at the end of that period. To treat it as indicating for the present purpose what proportions of each half-yearly payment are attributable to capital and to interest respectively is really to go back on the decision of the House of Lords which decided that under this arrangement the capital must be taken to be paid off by instalments. The contention of the defendant on this point really involves the taxation of capital under the Income Tax Acts; it treats this annuity as an ordinary terminable annuity, which the House of Lords have decided that it is not.

[They cited *Leeds Permanent Benefit Building Society* v. *Mallandaine*. (2)]

Sir R. B. Finlay, A.-G., and *Rowlatt* (*Sir E. H. Carson, S.-G.*, with them), for the defendant. This case is distinguishable from *Secretary of State in Council of India* v. *Scoble*. (1) The decision in that case, both in the Court of Appeal (3) and in

(1) [1903] A. C. 299. (2) [1897] 2 Q. B. 402.
(3) [1903] 1 K. B. 494.

the House of Lords, was based on the view that an antecedent debt must be taken to have accrued due under the original contract before the option to pay that debt by annuity was exercised. In that case the railway company had no option to take payment by annuity; the option to make payment in that way was given only to the Secretary of State. Here the whole transaction is a matter of bargain between the parties with regard to the three railways taken together, because the defendant, at the time when the arrangement for purchase was made, had no right to purchase the third railway compulsorily. It is submitted that, having regard to the language of the memorandum of terms and the recital in the Act of Parliament, the arrangement amounted to a voluntary bargain for sale of the railways in consideration of an annuity properly so called. It was like the purchase of an ordinary terminable annuity, in which case income tax is payable on the total amount of the annual payment. As a matter of political economy capital may always be said to be taxed to income tax in the case of every such annuity. The same may be said of the income of any wasting security. The taxation, for instance, of the profits of any business which deals with a subject-matter which is consumed in order to earn the profits and not replaced, as in the case of mines, may be said to be taxation of capital. But that is not taxation of capital in the legal sense of the term.

The second point decided by the learned judge really is governed by very much the same considerations as the first. The terms of the memorandum and the Act of Parliament shew that the transaction amounted in substance to the sale of the railway in consideration of the payment of an annual sum for a term of years, which sum must be taken to be made up as the parties have agreed that it shall be—namely, of interest to the extent of 4*l.* 6*s.* per cent., the remaining 5*s.* being a payment for the purpose of replacing capital at the end of the period for which the annuity is created.

[They cited *Foley* v. *Fletcher*. (1)]

Cripps, K.C., in reply.

Cur. adv. vult.

(1) (1858) 3 H. & N. 769.

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June 8. COLLINS M.R. read the following judgment:—This case comes before us on an appeal and cross-appeal by the plaintiffs and defendant respectively from a decision of Jelf J. The plaintiffs are the holders of a "so-called annuity" (I use the phrase employed by Jelf J. to describe it) granted by the Secretary of State for India as the purchase price of the interest of the plaintiffs in certain railways in India, a right to purchase which had been conferred on the Secretary of State upon terms settled between the plaintiffs and the East India Company prior to the construction of the railways. The action is brought to recover sums wrongfully deducted, as the plaintiffs aver, for income tax on the annual payments of the annuity. The plaintiffs contend that the question of principle applicable to this case has been decided by the House of Lords, affirming the decision of the Court of Appeal, in *Secretary of State in Council of India* v. *Scoble*. (1) The question arose there with respect to an annuity granted on the purchase of the then respondents' interest in another Indian railway under a contract in all material respects identical with that which conferred the right of purchase in this case. The House of Lords there held that what was given under the name of "annuity" in return for the interest purchased was a capital sum payable by instalments with interest, and that, therefore, income tax was payable only on such part of each instalment as consisted of interest; that, though called an annuity, it was not, when the substance of the transaction was looked at, the same thing that is made taxable under that name in the Income Tax Acts, which do not purport to tax capital. It was contended for the Secretary of State that certain modifications had been introduced by negotiation into the contract in this case, which had the effect of altering the nature of the annual payments, and converting them into an ordinary annuity within the meaning of the Income Tax Acts. It was pointed out that, whereas in *Secretary of State in Council of India* v. *Scoble* (1) the time before which the option of purchase could not be exercised had expired when the option was declared, and there was, therefore, in existence a debt or capital sum which had to be

(1) [1903] A. C. 299.

liquidated, in this case the purchase was arranged by bargain before the time for exercising the option had actually arrived. It was also urged that in the present case the method by which the annuity was to be calculated had been a term of the bargain, and had incidentally altered its character so as to take it out of the principle of the decision in *Secretary of State in Council of India* v. *Scoble*. (1) The case was twice heard before Jelf J.; and on the first occasion this latter point was not taken; and he held that, notwithstanding the fact that the option had by arrangement been exercised before the appointed time, the principle of *Secretary of State in Council of India* v. *Scoble* (1) applied, and the transaction must still be looked at as an arrangement for payment of a capital sum with interest by instalments, and not as an annuity in the ordinary sense, and he made a declaration in the terms prayed by the plaintiffs. The matter, however, came again before the learned judge, on liberty to apply given as to how the amounts of interest and principal were to be ascertained in each instalment; and on this occasion the method on which the annuity was calculated as recited in the agreement between the parties, which was subsequently embodied in an Act of Parliament, was strongly relied upon by the Crown as altering the whole character of the annual payments. The learned judge could not recall his judgment already given, but he has pronounced a decision reducing the sum attributable to capital in each instalment to 5*s.* out of every 5*l.* 12*s.* 6*d.*, and leaving the residue to be treated as income and taxable as such. Both sides appeal, the plaintiffs on the ground that the statement as to how the annual sum was calculated was merely for the purpose of shewing that the sum allowed was a proper one, and could not have the effect of altering the character of the payment, and of turning that which was in truth and in fact the liquidation of a debt by instalments into that which it was held not to be in *Secretary of State in Council of India* v. *Scoble* (1)—a mere annuity; the Crown, on the ground that the decision ought logically to treat the whole annual sum as consisting of income only and taxable as such. It is necessary to read the clauses dealing with the

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amount of the annuity and the letter which inclosed them, together with the recital in the Act which embodied them. The letter is in these terms: "The board of directors of the East Indian Railway Company are aware that the period is approaching when, under the terms of the contracts between the East India Company and the East Indian Railway Company of August 17, 1849, and February 15, 1854, the Secretary of State for India in Council may give notice of his intention to purchase the railway and works described in clauses 23 and 22 of those contracts respectively. Under the terms of the contract dated April 21, 1858, the Secretary of State in Council, as the board are likewise aware, has no such power in regard to the Jubbulpore line until after twenty-five years from that date. Being satisfied with the manner in which the affairs of the East Indian Railway have been administered under the direction of the company, the Secretary of State desires to continue a system of management of the same kind, but so as to secure to the State a larger share in the profits of the undertaking than it receives through the operation of the present contract. With this view, while prepared strictly to adhere to the terms of the contracts, in respect of the mode of purchase, the Secretary of State before formally giving notice desires to open a negotiation with the company for the simultaneous purchase of the Jubbulpore line, and for working the whole undertaking under the control of the Government. I inclose a memorandum of the terms on which the Secretary of State in Council will be ready to enter into a new agreement with the company for these purposes, and which he desires to submit for their consideration.—I have the honour to be, Sir, your obedient servant, Louis Mallet." Then there is the "Memorandum of terms." I need only read the first of them, I think: "That the purchase be made by means of an annuity terminable on February 14, 1953, calculated on a rate of interest of 4*l.* 6*s.* per cent. on a commuted price of 125*l.* per 100*l.* of capital stock, which gives, including 4*s.* for redemption of capital, an annuity of 5*l.* 12*s.* 6*d.* for each 100*l.* of capital stock so commuted at 125*l.* But that the shareholders be allowed an option of leaving in the hands of the Government, for the purposes hereafter

mentioned, a proportion not exceeding one-fifth of the commuted value of the capital stock of the company." Then there is the recital, which is material also: "And whereas in the said memorandum of terms the amount of the annuity of 5*l.* 12*s.* 6*d.* into which every 100*l.* stock of the company is intended to be commuted at a price of 125*l.* is calculated on the basis of 5*l.* 7*s.* 6*d.*, part thereof, being interest at the rate of 4*l.* 6*s.* per centum per annum on the said amount of 125*l.*, and of a sum of 5*s.*, other part thereof, being the amount required to be set aside and invested half-yearly in every year at a like rate of interest from the 1st day of January, 1880, up to the 14th day of February, 1953, in order to produce by means of a sinking fund the capital sum of 125*l.*, or thereabouts, on the said 14th day of February, 1953." In my opinion, this statement is merely made to justify the amount at which the annuity is fixed, and does not alter the fundamental character of the transaction as declared by the House of Lords in *Secretary of State in Council of India* v. *Scoble*. (1) I agree with the learned judge that the other fact as to the anticipation of the time for declaring the option and altering the date from which the instalments are to run does not interfere with the primary consideration that the arrangement is one for the discharge of a debt by payments extending over many years, and, therefore, requiring the addition of interest; and I cannot think that the arithmetical calculation by which the amount is fixed has had the effect of radically changing the transaction. The 5*s.* which is put down in that calculation as applicable to the formation of a sinking fund is not treated as an instalment of capital, but is treated as income, out of which the receiver can if he chooses form a sinking fund. The whole annual sum is in that view composed exclusively of income and taxable as such. If effect is to be given to the principle which declared that each instalment must be taken as including capital and income, it cannot be worked out on the lines indicated in the calculation. It can be worked out on the lines suggested in the table proposed by the plaintiffs. I am of opinion, therefore, that

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the plaintiffs' appeal should be allowed and the cross-appeal dismissed.

MATHEW L.J. and COZENS-HARDY L.J. concurred.

Appeal of plaintiffs allowed and cross-appeal dismissed.

Solicitors for plaintiffs: *Freshfields.*

Solicitor for defendant: *Solicitor of Inland Revenue.*

E. L.

C. A. 1905 *June* 8.

[IN THE COURT OF APPEAL.]

In re BOSWORTH AND CORPORATION OF GRAVESEND.

Burial Ground—Addition to—Land set apart for Interments in breach of Order in Council—Disused Burial Ground—Power to build on—Burial Act, 1853 (16 & 17 *Vict. c.* 134), *ss.* 1, 5, 6—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 4, *and Schedule.*

The provisions of ss. 1 and 6 of the Burial Act, 1853, apply to an addition to an existing burial ground as well as to an altogether new burial ground.

Where a piece of land was set apart for the purposes of interment, and part of it was used for those purposes, in contravention of an Order in Council made under s. 1 of the Burial Act, 1853:—

Held, that the definition of a "burial ground" in s. 4 of the Open Spaces Act, 1887, which is by that Act rendered applicable to the Disused Burial Grounds Act, 1884, included land which had been "set apart for the purposes of interment," even though it was so set apart in contravention of the Order in Council, and consequently could never have been lawfully used for the purposes of interment; and therefore that s. 3 of the last-mentioned Act prohibited the use of any part of the land so set apart for building purposes.

APPEAL from the judgments of Wright J. and Bray J. on a special case stated by an arbitrator. (1)

By an agreement in writing, dated October 2, 1901, Emily

(1) See [1905] 1 K. B. 403.

Lucy Bosworth and Helen Pauline Bosworth, hereinafter called the vendors, agreed to sell to the corporation of Gravesend a cemetery called the Gravesend and Milton Cemetery, in the parish of Gravesend, at a price to be fixed by arbitration, and to be based upon the fair value of the property as between willing seller and willing buyer.

Part of the Gravesend and Milton Cemetery was the original cemetery belonging to the Gravesend and Milton Cemetery Company, which was incorporated by special Act of Parliament in 1838.

On August 11, 1854, an Order in Council was made under the provisions of the Burial Act, 1853, whereby it was ordered that no new burial ground should be opened in (amongst other places) Gravesend without the previous approval of one of Her Majesty's Principal Secretaries of State.

In 1859 one J. R. Hull, one of the predecessors in title of the vendors, who was then the owner of the cemetery, acquired an additional piece of land adjoining thereto, hereinafter called "the additional piece."

On November 22, 1884, the following letter was sent to Her Majesty's Principal Secretary of State for Home Affairs:—

"Sir,

"Gravesend Cemetery.

"The Bishop of Rochester has been requested to consecrate an addition to the proprietary cemetery at Gravesend, in the county of Kent, and, referring to the Order of Her Majesty in Council of August 11, 1854, I take the liberty of asking whether, considering the form of the order, your approval is necessary to such addition being used for burials.

"(Signed) G. H. Knight,
"Registrar of the Diocese of Rochester."

In reply thereto the following letter was received:—

"Whitehall,
"December 11, 1884.

"Sir,—I am directed by the Secretary of State to acquaint you, with reference to the letter from this department of the 26th ult., stating that the approval of the Secretary of State

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would be necessary for the opening of any new burial ground in the parish of Gravesend, that the Extra-Metropolitan Burials Act (16 & 17 Vict. c. 134) does not, by reason of the saving in s. 5 of that Act, apply to the Gravesend Cemetery, which was established under the Gravesend Cemetery Act, 1838, and that the sanction of the Secretary of State to the proposed addition to that cemetery is not required; and I am to state that this letter may be substituted for the letter previously addressed to you, which perhaps you will be so good as to return to this office.

"(Signed) Godfrey Lushington."

The said "additional piece" of land was not used as a cemetery before December 11, 1884, but subsequently thereto the whole of it was set apart and consecrated as a burial ground inclosed by a wall, and part of it has been used as a burial ground.

There was no consent to the user of the said "additional piece" by any of the Principal Secretaries of State unless the aforesaid letter of December 11, 1884, constitutes such consent.

Of the said "additional piece" a portion has either actually been used for interments, or is so situated that it cannot be conveniently separated from the part so used. The remaining part could be conveniently separated from the part so used by a fence so as to be available for building.

It was contended on behalf of the purchasers:—

1. That the "additional piece" of land was inclosed within the cemetery walls in violation of the Order in Council and the provisions of the Burial Act, 1853.

2. That having regard to the matters in the last paragraph contended, and to the judgment of the Court of Appeal in *Ward* v. *Mayor of Portsmouth* (1) in so far as it decides that an addition to an existing burial ground is within the provisions of s. 6 of the said Act, the "additional piece" cannot lawfully be buried in.

3. That the "additional piece" having been inclosed as aforesaid and having been used as a burial ground cannot now, by reason of the decision of the Court of Appeal in *In re*

(1) [1898] 2 Ch. 191.

Ponsford and Newport District School Board (1), be used for building land.

4. That the "additional piece" must not be valued either as ground in which interments can legally be made or as building land, but must be valued on the basis that it cannot be put to either of such uses.

It was contended on behalf of the vendors:—

1. That by reason of s. 5 of the Burial Act, 1853, which provided that its provisions should not extend to prevent burials "in any cemetery established under the authority of any Act of Parliament," the said Act does not apply to the Gravesend and Milton Cemetery or to additions thereto.

2. That the case of *Ward* v. *Mayor of Portsmouth* (2) does not affect the law as it was in 1884, and that at that date an addition to an existing burial ground was not under the Act a new burial ground.

3. That, if the Burial Act, 1853, and the Order in Council do apply, the letter dated December 11, 1884, constituted such approval as was required under the said Act and Order in Council.

4. That, if the said "additional piece" cannot be legally used as a cemetery, that portion of it which has not been already used for graves can be thrown into the adjoining fields and utilized and valued as building land.

The questions for the Court are whether—

(*a*) The "additional piece" of land can be used as a burial ground.

(*b*) If not, whether that part of the "additional piece" which can conveniently be severed from the part actually used for interment can be used for building purposes.

If in the opinion of the Court the answer to the first question should be in the affirmative, the arbitrator fixed the price to be paid by the purchasers at 9711*l.*

If the answer to the first question should be in the negative, but to the second in the affirmative, he fixed the price at 9015*l.*

If the answer to both questions should be in the negative, he fixed the price at 8305*l.*

(1) [1894] 1 Ch. 454. (2) [1898] 2 Ch. 191.

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The argument upon the special case herein was heard before Wright J., who answered question (*a*) in the negative, upon the ground that the Order in Council of August 11, 1854, did apply to the "additional piece," notwithstanding the terms of s. 5 of the Burial Act, 1853, and that the letter of December 11, 1884, did not amount to an approval by the Secretary of State. Before answering question (*b*) he directed the arbitrator to define more clearly upon a plan the portion of the "additional piece" to which that question related, and the further argument of the case stood over for that purpose. The argument upon the latter question afterwards came on before Bray J. (see [1905] 1 K. B. 403), who held that the prohibition imposed by s. 3 of the Disused Burial Grounds Act, 1884, against the erection of buildings upon a disused burial ground applied to the additional piece of land, and therefore answered the question in the negative. (1)

Danckwerts, K.C., and *Eustace Hills* (*Sir E. Boyle, K.C.*, with them), for the appellants. With regard to the first question, the appellants contend that the enlargement of an

(1) By the Metropolitan Open Spaces Act, 1881, s. 1, "The term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800."

By the Disused Burial Grounds Act, 1884, s. 3, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

Sect. 2: "In this Act a 'disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein."

By the Open Spaces Act, 1887, s. 2, sub-s. 1, "The Metropolitan Open Spaces Act, 1881, is hereby repealed to the extent mentioned in the schedule to this Act."

Sect. 4: "In the Disused Burial Grounds Act, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council."

Schedule: "Portions of the Metropolitan Open Spaces Act, 1881, repealed." "In the same section (s. 1) the following words occurring in the definition of a 'burial ground,' viz., 'and in which interments have taken place since the year 1800.'"

old burial ground in full use is not the opening of a new burial ground within the meaning of the Burial Act, 1853, ss. 1, 6; and by s. 5 of that Act the provisions of the Act are not to extend to burials in any cemetery established under the authority of an Act of Parliament, as was the Gravesend and Milton Cemetery. The actual decision in *Ward* v. *Mayor of Portsmouth* (1) is not really to the contrary of this contention. There are no doubt dicta of Lindley M.R. in that case to the effect that "new burial ground" in the Act covers an addition to an existing burial ground, but they were not really necessary to the decision, because it was held that, even assuming that to be so, there was no defence to the action.

With regard to the second question: in order that the additional piece of land may be a "disused burial ground" within the definition in s. 4 of the Open Spaces Act, 1887, it must have been "set apart for the purposes of interment" within the Metropolitan Open Spaces Act, 1881, s. 1, and must be "no longer used for interments." It is submitted that land cannot be said to have been in point of law "set apart for the purposes of interment," when it never could lawfully be used for those purposes; and the portion of the additional piece referred to in question (*b*) never has been used for the purposes of interment. The additional land cannot be said to have been a burial ground except to the extent of its de facto user as such. The residue of it cannot be said to have been "set apart for the purposes of interment" in any legal sense, nor can it be said to be "no longer used" as a burial ground, inasmuch as it never was, and never lawfully could be, so used. The case of *In re Ponsford and Newport District School Board* (2) is distinguishable; for there the ground in question was lawfully set out as a burial ground.

Freeman, K.C., and *Colefax*, for the respondents. With regard to the first question, the case of *Ward* v. *Mayor of Portsmouth* (1) is a clear authority in the respondents' favour. The opinion expressed by Lindley M.R. in that case can hardly be said to be a mere obiter dictum. The question whether s. 6 of the Burial Act, 1853, applied to an addition to

(1) [1898] 2 Ch. 191. (2) [1894] 1 Ch. 454.

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an existing burial ground had been decided in the affirmative by Byrne J. in the Court below; and in the Court of Appeal it was fully discussed, and the whole reasoning of the judgment proceeds on the assumption that the approval of a Secretary of State was necessary to the use of the additional ground as a burial ground.

With regard to the second question, the additional land clearly comes within the definition in s. 4 of the Open Spaces Act, 1887. The whole of it was land that was "set apart for the purposes of interment"; it was in fact used and can now no longer be used for those purposes. It was held by the Court of Appeal in *In re Ponsford and Newport District School Board* (1) that the words "no longer used" mean nothing more than not used, and that to bring a piece of land within the definition of a disused burial ground it is not necessary that it should ever have been used for interments at all.

Eustace Hills, in reply.

COLLINS M.R. This is an appeal from the decision of Wright J. on the first question and from the decision of Bray J. on the second question raised by the case. The case came before the former learned judge in the first instance, and he decided the first question raised in the negative, but sent the case back to the arbitrator for further inquiry into the facts with regard to the second question raised. The case afterwards came before Bray J. on the second question, which he answered in the negative. The appellants appeal against both those decisions.

Considering that the case deals with points under the Burial Acts, I think the questions raised are comparatively simple.

There was a burial ground, called the Gravesend and Milton Cemetery, which originally belonged to a company incorporated by special Act in 1838. In 1854 an Order in Council was made under the Burial Act, 1853, whereby it was ordered that no new burial ground should be opened in (amongst other places) Gravesend without the approval of a Secretary of State. In 1859 one Hull, who seems somehow to have acquired the

(1) [1894] 1 Ch. 454.

property of the cemetery company, acquired an additional piece of ground adjoining thereto, which is the subject of the decisions against which this appeal is brought. Having acquired this land for the purpose of throwing it into the cemetery, he took steps to have it consecrated by the bishop, who put himself into communication with the Home Office to know whether the approval of a Secretary of State was necessary. The Home Office in reply, in effect, renounced jurisdiction, indicating that in their opinion they had no right to intervene in the matter. Subsequently, the piece of ground was consecrated, and set apart for burials, a wall being built round it, and burials took place there. A contract has been entered into for the purchase by the corporation of Gravesend of the cemetery, including this additional piece of ground, from the successors in title of Hull, the present appellants, at a price to be fixed by arbitration: and this case is stated in order to determine what standard the arbitrator is to apply in fixing the price. For that purpose the arbitrator has submitted two questions to the Court, namely, (*a*) whether the additional piece of land can be used as a burial ground; (*b*) if not, whether that part of it which can conveniently be severed from the part actually used for burial purposes can be used for building purposes; and he has fixed alternative sums as the price of the land to meet the case of either of these questions being answered in the affirmative or that of their both being answered in the negative. Wright J. has held that the additional piece of land cannot be used as a burial ground; and Bray J. has held that it cannot be used for building purposes. Therefore the result, if their decisions stand, is that the third alternative sum is fixed as the contract price.

I will deal first with the question whether the additional piece of land can be used as a burial ground. It is argued for the appellants that this is not a case of opening a new burial ground, but merely of adding a bit of land to one that was already opened. When one considers the reasons for the legislation prohibiting the opening of a new burial ground without the approval of a Secretary of State, it appears clear

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that they apply with as much force to the adding of a piece of land to an existing burial ground as to the opening of an altogether new one. The objection is to applying fresh ground to burial purposes in a populous place. There is no difference for this purpose between a new burial ground and an addition to an old one. The latter comes directly within the mischief struck at by the Act. It seems to me that Wright J. was perfectly correct in the view which he took; and I think that the point was really decided in *Ward* v. *Mayor of Portsmouth*. (1) The head-note of that case states that it was there held "that s. 6 of the Act of 1853, which provides that no new burial ground shall be 'provided and used' within the limits there specified without the approval of a Secretary of State, applied to an addition to an existing burial ground." It has been contended that the opinion expressed in that case on this particular point was obiter only, in the sense that the actual decision in the case would have been the same, whichever view had been taken of that point; but, assuming that to be so, the reasons given by the Court, in coming to the conclusion at which they arrived, are of weight as an authority, especially if they be such as to command our assent, even though not amounting to an actual decision. Apart from that authority, I should without hesitation say that an addition to an existing burial ground stood on the same footing as opening an altogether new burial ground for the purposes of the Burial Act, 1853.

I now come to the second question, namely, whether part of the additional piece of land can be used for building purposes. That depends on the legislation upon the subject, which is conveniently set out in the note to the report of the case in [1905] 1 K. B. 403. First of all by s. 1 of the Metropolitan Open Spaces Act, 1881, "the term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1880." Then by the Disused Burial Grounds Act, 1884, s. 3, "After the passing of this Act, it shall not be lawful to erect

(1) [1898] 2 Ch. 191.

any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship." By s. 2 of the same Act, "In this Act a 'disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein." By the Open Spaces Act, 1887, s. 2, sub-s. 1, "The Metropolitan Open Spaces Act, 1881, is hereby repealed to the extent mentioned in the schedule to this Act." By the same Act, s. 4, "In the Disused Burial Grounds Act, 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council." In the schedule to that Act under the head "Portions of the Metropolitan Open Spaces Act, 1881, repealed," we find: "In the same section (s. 1), the following words occurring in the definition of a 'burial ground,' viz., 'and in which interments have taken place since the year 1880.'" It seems to me that the definition in s. 4 of the Open Spaces Act, 1887, exactly covers this case. This piece of land was in fact set apart for the purposes of interment, and interments did take place there. The only point really made is that the words "set apart" in the definition must mean "lawfully set apart," and the land here in question could not be said to have been lawfully set apart for the purposes of interment, because the approval of a Secretary of State had not been obtained. I see no ground for reading the word "lawfully" into the definition as suggested. It seems to me that a piece of ground, which has been de facto set apart and used as a burial ground, though unlawfully, comes as much within the scope of the Act as a piece of ground which has been lawfully so set apart and used. With regard to the supposed inconsistency between the two contentions of the respondents, which appears to have impressed the learned judge below, I must say that I cannot myself see any such inconsistency. It was said that they were

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affirming on the one hand that the land in question was not a burial ground, in order to relieve themselves from paying for it as such, while on the other hand they were saying that it was a burial ground. But, the matter in question being the price to be given for the land, there does not seem to me to be anything inconsistent in saying, for the purpose of estimating the price, that it has lapsed from the condition of a burial ground, but that by reason of its having once been a burial ground, it cannot now be used for building purposes. For these reasons I think the decisions appealed against were correct, and this appeal must be dismissed.

MATHEW L.J. I am of the same opinion. The decision of Wright J. upon the first point, namely, as to the character of the addition to the old cemetery, appears to me to be correct. It was argued that, because that land was bought for the purpose of being added to an existing cemetery, it must be treated as having the character of an old burial ground. It seems to me that, according to the ordinary use of language, it is a "new burial ground" and cannot be treated as an old one. Apart from the ordinary meaning of the words, there are further considerations which arise with reference to the object of the Legislature in passing ss. 1 and 6 of the Burial Act, 1853. It is obvious that the object aimed at in these sections was the prevention of what was deemed insanitary. That object might be entirely defeated, if it were possible from time to time to make large additions to an existing cemetery, and to use them for burials, without the approval of the Secretary of State.

With regard to the second question, namely, whether the additional land can be used for building purposes, it appears to me clear, upon consideration of the language of the Acts to which we have been referred, that this question must be answered in the negative. This land was in fact "set apart for the purposes of interment," and I think that, upon ceasing to be used for those purposes, it became 'a disused burial ground' within the meaning of s. 4 of the Open Spaces Act, 1887. That being so, s. 3 of the Disused Burial

Grounds Act, 1884, forbids the use of any part of it for building purposes.

COZENS-HARDY L.J. concurred.

Appeal dismissed.

Solicitors for appellants: *Harries, Wilkinson & Raikes, for C. E. Hatten, Gravesend.*

Solicitors for respondents: *Nicholson, Patterson & Freeland.*

E. L.

[RAILWAY AND CANAL COMMISSION.]

1905
April 4, 14.

CHARRINGTON, SELLS, DALE & CO. *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Carriage of Coal in Traders' Trucks—Delay in Transit—Demurrage for unreasonable Detention of Trucks—London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxxi.*), s. 6.

By s. 6 of the London and North Western Railway Company (Rates and Charges) Act, 1891, where merchandise is conveyed in trucks not belonging to the company, the trader is entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period.

Coal in owners' trucks was conveyed by a railway company for the applicants, a firm of coal merchants, from certain collieries on their line of railway to the applicants' reserved sidings in London, the trucks being returned to the collieries without additional charge; the average duration of the transit during a period of twelve consecutive months was two and a half working days. The applicants complained that in thirty-three instances during the twelve months their trucks had been detained an unreasonable time in transit, the time taken in nineteen instances being four days, in twelve instances five days, in one instance six days, and in one instance seven days, and they claimed to be entitled to demurrage in respect of the unreasonable detention of these trucks:—

Held, first, that s. 6 applied to a claim for detention of the trucks during transit, and not merely to cases where the detention occurred before its commencement or after its conclusion; secondly, that the time occupied in the thirty-three instances in the transit being largely in excess of the average, the onus was upon the defendants to shew that the period of detention of the trucks was not unreasonable, and that they had

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failed on the facts to discharge that onus; and, thirdly, that a sum of 6*d.* per ten-ton truck per day was a reasonable allowance in respect of the detention.

APPLICATION for the determination of a difference between the parties referred by the Board of Trade to the Railway and Canal Commission as arbitrators. The application was substantially in the following terms.

1. The applicants are coal factors and merchants, with a chief place of business in London, and having coal sidings and coal depots at or in connection with a large number of stations on the railways of the defendants and of other companies.

2. Coal for the applicants is conveyed by the defendants over their railway in trucks which belong to the applicants.

3. The rates paid by the applicants for conveyance entitle them to the return of their trucks to the place where the traffic originated without any additional charge.

4. By s. 6 of the schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), it is provided that "where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, either by the company or by any other company over whose railway the trucks have been conveyed under a through rate or contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

5. Trucks belonging to the applicants are frequently detained for long periods by the defendants, and in particular their trucks containing the traffic referred to in the schedule to this application were detained for the periods mentioned in the said schedule.

6. The applicants contend that the periods of detention referred to in the schedule were unreasonable. They claim that 3*s.* per truck per day is the reasonable sum by way of demurrage to which they are entitled for the detention of their said trucks beyond two clear days.

The applicants applied (1.) for the determination of the said difference, and (2.) for an order that the defendants should pay them such sum as should be found to be due to them in respect of the detention of the trucks referred to in the schedule.

The schedule gave particulars of thirty-three cases of detention of trucks sent from certain collieries in the Midlands to the applicants' sidings at Old Ford or Falcon Lane in London, in nineteen of which four working days were occupied in transit; in twelve, five days; in one, six days; and in one, seven days.

In substance the answer of the defendants was a traverse of the allegations in paragraphs 5 and 6 of the application.

Evidence was given from which it appeared that, taking the whole of the instances of coal carried under similar circumstances by the defendants for the applicants in the year 1903, the average time taken in transit was two and a half days.

Pickford, K.C., and *Rowland Whitehead*, for the applicants. Without contending that the average time must in all cases be the reasonable time to be occupied in transit, it is a most material element in determining what a reasonable time for the transit really is, and if a journey takes a time largely in excess of the average it lies on the railway company to explain it. In the case of passengers it has been held that a delay of fifteen minutes required explanation: *Le Blanche* v. *London and North Western Ry. Co.* (1); and it is contended that that decision, which simply expresses the rule of the common law, should be applied to the present case.

Cripps, K.C., and *J. A. Simon*, for the defendants. The decision in *Le Blanche* v. *London and North Western Ry. Co.* (1) is no authority; there was in that case an advertised time-table, a material departure from which would require explanation, whereas in goods and mineral traffic there are no advertised time-tables, the working tables issued to the company's servants being merely indications of the time which under ordinary circumstances a goods or mineral train may be

(1) (1876) 1 C. P. D. 286.

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expected to take between certain points. The mere fact that certain of the journeys are in excess of the average is not evidence of unreasonable detention; that some journeys should exceed the average length is necessarily involved in the very notion of an average, and in such cases it lies upon the applicants to shew that the detention was unreasonable.

[BIGHAM J. The onus of proof seems to be upon the defendants to shew that the existing circumstances in any particular instance are not ordinary circumstances, and that consequently the average is inapplicable.]

It is admitted that in very exceptional cases the transit might be so greatly in excess of the average—as, for instance, fifty days—as to be ipso facto unreasonable, or at any rate to call for explanation; but the mere fact that on a particular occasion five days are taken for a transit, the average duration of which is two and a half days, is no evidence of unreasonable detention. Regard should be had to the limits of ordinary normal fluctuation, and where the time is within those limits there is no evidence that the detention by the company is unreasonable and no case calling for an answer. Further, demurrage does not include detention during transit.

[They cited *Hick* v. *Raymond and Reid.* (1)]

Cur. adv. vult.

April 14. (2) BIGHAM J. This is a reference under s. 6 of the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891. The section reads as follows: "Where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, either by the company or by any other company over whose railway the trucks have been conveyed under a through rate or

(1) [1893] A. C. 22.

(2) It will be seen that this decision is to some extent a decision on questions of fact. Inasmuch, however, as the principles underlying the decision are capable of extensive application, it is thought desirable to report the judgments in extenso.—REPORTER.

contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade." The traders, the applicants, allege that certain trucks belonging to them, and in which coal was being conveyed for them by the railway company, were detained in transit beyond a reasonable period, and they claim to be paid a reasonable sum by way of demurrage for such detention. What we have to determine is whether the trucks were detained beyond a reasonable period, and, if so, what sum the railway company ought to pay by way of demurrage.

A question of law was also raised, namely, whether s. 6 applies at all to a claim for detention during transit; it is contended on behalf of the railway company that it does not. It is said that a claim for demurrage can only arise where the detention has occurred before or after the transit. This is really a pleader's point. No doubt in charterparties a technical distinction is often drawn between demurrage proper and damages for detention, as is pointed out in s. 609 of Carver's Carriage by Sea. But there is no reason to suppose that the Legislature intended any such distinction to be introduced into this Act of Parliament. The reasonable period mentioned in s. 6 is obviously a reasonable period for the performance by the railway company of their contract of carriage. The time begins to run as soon as the truck is in the hands of the company and available for the work it has to do. After a reasonable time has elapsed for the carriage of the merchandise, then the liability of the company under the section arises. If it were otherwise, there would be the anomaly of a claim at common law for unreasonable detention during the transit, and a claim under the statute for any continuing delay after the transit.

We come then to the question of fact, first, were the trucks detained beyond a reasonable period? The trucks in question are thirty-three in number, and they were employed in the carriage of coal from the group of collieries to the railway sidings at Old Ford and Falcon Lane in London, which are appropriated by the railway company to the use of the applicants. The detention in each of the thirty-three cases is said to have taken place between the delivery of the loaded wagon

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at the colliery and the return of the empty wagon to the colliery, that being the journey which the railway company had contracted to make. Nineteen of the journeys were performed in four days, twelve in five days, one in six days, and one in seven days. The thirty-three journeys were performed in the year 1903, and it has been proved to us that, taking an average of all the journeys performed by the railway company for the applicants in that year, the time occupied was approximately two and a half days per journey. The applicants contend that this circumstance entitles them to assume that the railway company has been in default in the particular instances complained of, or at all events that the burthen is thrown on the railway compay of shewing that the circumstances in each case were of such an exceptional character as to justify the apparent excessive detention. It is, I think, clear that in extreme cases the railway company would have to bear this burden, and the question we have to decide is whether the cases complained of are of such an extreme character; if they are, the railway company ought to pay, for they have not been able to prove any exceptional circumstances explaining and justifying the delay. In my opinion each one of the thirty-three cases calls for an explanation, not merely because the average time has been exceeded (for the very expression "average time" presupposes the existence of cases in which the time occupied has been longer than the average), but because the average has been so very much exceeded. The difficulty, of course, arises when one has to fix the point at which the onus of proof shifts; but it is a difficulty with which we must deal, and we have come to the conclusion that, as things exist at present, a primâ facie case is made out against the railway company whenever a journey occupies more than three days. If in such cases the railway company are unable to explain and justify the delay beyond three days, they must submit to pay. This three-day limit is not, however, to be regarded as fixed for all future time; that is why I have used the expression "in existing circumstances." The circumstances affecting the traffic might conceivably so change as to make the limit no longer reasonable, and then the limit would

require readjustment. It follows from what I have said that in our opinion the railway company is liable in each of the thirty-three cases, and we so find.

The question then remains as to how much the railway company ought to pay, and we think that 6*d.* per ten-ton wagon per day is a reasonable sum.

SIR FREDERICK PEEL. [After reading s. 6, the learned Commissioner proceeded :—] Coal in owners' trucks has been conveyed by the railway company for the applicants, and the difference which has arisen under this section, the determination of which the Board of Trade has referred to this Court, is whether in certain instances there has been an unreasonable detention of trucks belonging to the applicants in so far as the period of detention during conveyance has exceeded two and a half days. The railway company contends that s. 6 has no reference to detention of trucks during conveyance, and that it applies only to detentions at times similar to those at which demurrage would be payable in shipping cases under a charter-party. But demurrage has also the meaning of a payment for any delay or detention, and as between railway companies (as the Clearing House regulations shew) it is in common use to denote the charge which companies have to pay for detention of stock when the time allowed for its transit over their railways is exceeded. That this is the sense in which the word is used in s. 6 is made clear by the provision that the company with whom the contract of carriage is made shall be liable whether the delay occurs through its own default or through that of any other company over whose railway their trucks have passed under a through rate. Such a railway, part of a through route, might of course be intermediate between the railways of the terminal companies, and any delay on an intermediate railway would only be a delay during conveyance.

The trucks which were alleged to have been a longer time on their journey than was reasonable were sent from collieries on the system of the London and North Western Railway Company or served by it, viâ Rugby and Willesden, to the company's London depots at Old Ford and Falcon Lane, where the

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applicants had reserved sidings, the distances varying from 100 to 150 miles, and the answer to the question how far there was an undue delay as alleged depends, I think, upon what time in our opinion might reasonably be allowed for the journey under its ordinary circumstances of a coal traffic from the colliery sidings to the applicants' sidings, and how far, if that time was exceeded, the railway company are able to shew special circumstances that explain and justify the delay. The coal for the distance from Rugby to Willesden is conveyed in full train-loads, and, except where the trains consist of both high and low level trucks, goes through without a stop. The time, therefore, of trains or individual trucks on this part of the route would not vary much, but for the other parts of it the number of railway junctions with colliery lines at which trucks destined for the trains from Rugby are sorted and marshalled, as also the number of depots in London besides Old Ford and Falcon Lane for which Willesden is the distributing centre, make it difficult to lay down a general rule limiting the business to any particular time. But we have a return in this case of the actual time in 1903 that it took the railway company to convey the applicants' trucks, and it appears that out of a total number of 467 trucks 266 were delivered in two days or under, and 425 out of 467 in three days or under. Whether these proportions are true of the trucks carried for other traders between the same points in the same year we do not know, and considering that any time we may fix as reasonable would apply to all such trucks alike, and that for any truck detained a longer time its owner is entitled to make a charge upon the company, we may, I think, in giving effect to this provision of s. 6, have regard to the principle we have acted upon in determining differences of a similar character that have arisen under s. 5 of the Rates and Charges Acts of the various companies. In both sections the question is one of a reasonable period—in s. 5 for a trader to take delivery and to complete unloading and in s. 6 for a railway company to make delivery. In the cases brought before this Court under s. 5 it was found that the great majority of traders could and did take less than four

days to receive their traffic from the carrier, but there was a percentage of them that could reasonably ask for the longer period, and to suit all classes the extended time was allowed. So in the present case, although the railway company have more often than not delivered trucks in two days, the occasions have been frequent when they have exceeded two days, and for a practicable general time, considering the impediments in the way of mineral traffic which must always be worked in subordination to the exigencies of other classes of traffic, two days would, I think, be too short a period. I would fix the reasonable period at three days, exclusive of any detention due to special causes of a kind for which a railway company cannot be held responsible.

As to the sum to be allowed by way of compensation to a trader entitled to make a charge, I agree with the view expressed by Bigham J. that it should be 6*d*. per ten-ton truck per day.

HON. A. E. GATHORNE-HARDY. In this case there are three points for decision: first, whether delay of trucks in transit comes within s. 6 of the London and North Western Railway Company's Act of 1891; secondly, whether in the case referred to in the schedule to the application the applicants' trucks, or any of them, have been detained beyond a reasonable period; thirdly, the reasonable sum per day which the applicants are entitled to recover by way of demurrage.

On the first point the railway company contended that the section did not apply to detention during the period of carriage at all, but only to detention either before or after the transit is complete, and that traders were still left to their common law remedy for damages for delay in transit. I am of opinion that to adopt this view would give too restricted an application to the section. The trader has no means of tracing the course of his wagon and coal between the time when it is handed over to the custody of the railway company and its arrival at its destination at his depot, or of distinguishing between delay occasioned by detention at various points by the contracting company or any other company, and delay during transit; at

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the same time, I think that the word demurrage used in the section, which is usually applied to a stationary detention, is ill-chosen and calculated to mislead.

Next we have to determine whether the trucks in the schedule, or any of them, have been detained beyond a reasonable period. This must mean a reasonable period under the particular circumstances and conditions of each case, and the evidence upon which I have to act is so imperfect that I have great difficulty in arriving at a conclusion. On behalf of the applicants it was proved that a wagon can under favourable circumstances perform the journey in two days or under, and that, taking the whole number of the applicants' wagons going to Falcon Lane and Old Ford in 1903, the average time in which the journey was performed was about two and a half days. On this evidence the applicants contend that where it can be shewn that a wagon took four, five, six, or even seven days to perform the journey, the evidence of a default under s. 6 was conclusive unless the defendants succeeded in displacing the presumption by shewing some circumstances justifying the delay. It seems obvious that there must be some period of transit so extravagantly long as ipso facto to raise a presumption of unreasonable delay, and shift the onus of proof on to the defendants, or rather (to speak more accurately) to establish their liability, unless they can shew some circumstances to account for or excuse the abnormal time occupied in transit; but the railway company contend that where, as in the case of mineral traffic, the period of transit must necessarily be extremely variable, none of the cases in the schedule are sufficiently long to raise even a primâ facie presumption of unreasonable delay. The defendants' mineral manager said that it was a necessary incident of the traffic, however carefully it was conducted, constantly to exceed the average time of transit. He instanced holiday traffic, fogs, weather conditions, and the necessity of carrying full train-loads, and so leaving "unlucky wagons" behind, as reasons why the time occupied in transit necessarily fluctuated very widely. He also pointed out that it was the interest of foremen and inspectors at the mineral sidings to get wagons away as soon as possible. He added generally that in

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the whole of the cases in the schedule he was unable to find any circumstances indicating delay or default on the part of the company. I am clearly of opinion that the mere fact that the average time of transit has been exceeded raises no presumption whatever of unreasonable delay. It is the very essence of an average that it should be made up of cases above and cases below the central line, and it would not be an average if both did not exist. If the average were adopted as the point where a presumption of unreasonable delay arose, this absurdity would follow—that, if in future years the company by great diligence reduced the period of transit, they would still be liable whenever the new and much shorter average period was exceeded. If we must fix a time applicable to these cases, I think we should allow for a wide margin of fluctuation. I have, as I have said, a difficulty in forming a logical conclusion, but I agree with my colleagues in taking three days as a reasonable period for the journey. As to the reasonable sum to be paid for each day's detention beyond a reasonable period, I agree that 6*d.* is sufficient.

Judgment for the applicants.

Solicitors for applicants: *E. F. Turner & Sons.*
Solicitor for defendants: *C. de J. Andrewes.*

W. J. B.

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April 12, 18.

SQUIRE *v.* MIDLAND LACE COMPANY.

Master and Servant—Wages—Deductions in respect of Damaged Goods—"Workman"—Employers and Workmen Act, 1875 (38 & 39 *Vict.* c. 90), s. 10—*Truck Act*, 1896 (59 & 60 *Vict.* c. 44), s. 2.

The respondents, a firm of lacemakers, whose premises were a factory within the meaning of the Factory and Workshop Act, 1901, were in the habit in common with other lacemakers of handing finished lace after its removal from the machines to women called "clippers" for the purpose of having superfluous threads and material removed. The clippers, who were not employed exclusively by any one firm, undertook to get lace clipped, and applied to the manufacturers for lace, which they took home with them for that purpose. The lacemakers had no control over the clippers, who might and often did employ others to assist them in the work; the clippers might execute the work themselves or give it to others to execute, or might return it unexecuted. The clippers were responsible in case of the non-return of the lace, and were paid at the end of each week according to the work done; they were required to pay for damage done to the lace in clipping.

Lace was handed by the respondents to two clippers: one was an outsider who had never worked in the respondents' factory, and did the clipping at home herself; the other was employed daily in the factory, and after it was closed at night she occasionally took the work home to do, and was assisted by her daughter. The lace handed to the two clippers having been damaged, a sum of sixpence was in each case deducted from the amount due to them at the end of the week; the conditions of s. 2 of the Truck Act, 1896, as to the making of deductions in respect of damaged goods were not complied with, and the deductions were illegally made if the clippers were workwomen within the Act:—

Held, that, as the clippers were not bound by the terms of their contracts to execute the work or any part of it themselves, they were not workwomen within the meaning of s. 10 of the Employers and Workmen Act, 1875, and, therefore, were not entitled to the protection of s. 2 of the Truck Act, 1896.

Ingram v. *Barnes*, (1857) 7 E. & B. 115, 132, and *Pillar* v. *Llynvi Coal Co.*, (1869) L. R. 4 C. P. 752; 38 L. J. (C.P.) 294, followed.

CASE stated by justices for the city of Nottingham.

Two summonses had been issued against the respondents. The first summons charged that on June 13, 1904, being the occupiers of a certain factory within the meaning of the Factory and Workshop Act, 1901, and being employers within the Truck Act, 1896, they did unlawfully make a deduction from the

sum contracted to be paid to a "workman," to wit, Mrs. Annie Lizzie Flinders, in that the deduction was not made in pursuance of such a contract as is required by s. 2, sub-s. 1, of that Act. The second summons charged a like offence in like terms on June 23, 1904, as to Mrs. Amy Lamb. At the hearing the following facts were admitted or proved.

The appellant was one of His Majesty's inspectors of factories; the respondents were lace manufacturers and occupiers of a factory within the meaning of the Factory and Workshop Act, 1901, and would have been employers within the meaning of the Truck Act, 1896, if the last-mentioned Act had applied under the particular circumstances of the cases. After lace has been removed from the machines it has to go through the process of being clipped—that is, superfluous threads and material have to be removed. In the city of Nottingham there are a large number of women known as "clippers," who carry on the business of clipping, undertake to get laces clipped, and with that intent apply to the manufacturers for lace and take it home to be clipped. Clippers are not employed exclusively by any one firm or for any definite time, but are independent, and may and do take laces from different firms. They may and do employ other persons to assist them, the firms having no control whatsoever over them. Clippers may refuse to take work, and, having taken it, may execute it themselves or give it to other persons to execute, or may return it unexecuted, and the manufacturers may refuse to give them work as they please. Clippers are responsible in case of non-return of the lace. They are paid at the end of each week, when the account is made up according to the amount of work done. The lace is examined, and if any damage has been done to it the clipper is required to pay damage in respect of it. This course of business has been in vogue in Nottingham for considerably over twenty-five years, and clippers are generally well aware of it.

Annie Lizzie Flinders sought to obtain lace for clipping from the respondents, and some was handed to her. She took it home, and subsequently returned it clipped but damaged; and on June 13, 1904, a sum of sixpence was deducted from

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the amount due to her for clipping. The lace was given out to her only as an outworker. She had never worked in the respondents' factory, and she did the clipping at home herself.

Amy Lamb under similar circumstances obtained laces from the respondents and returned them damaged; and on June 23, 1904, the sum of sixpence was deducted for damages in respect thereof from the amount due to her. She had been employed daily in the respondents' factory for more than a year, and occasionally after the factory closed at night she took work home to do. She knew that her home work was not considered as part of her work at the factory, and also that deductions were made from her wages for damaged goods. Her daughter assisted her in the clipping, and did part of the damage in respect of which the particular deduction was made.

It was contended for the respondents that the appellant had failed to prove in both cases any contract of service; that the term wages had been wrongly used, and the payments were simply money for work done; that there was no contract to execute the work personally, and that neither Mrs. Flinders nor Mrs. Lamb was a "workman" within the definition in s. 10 of the Employers and Workmen Act, 1875.

The justices were of opinion that neither Mrs. Flinders nor Mrs. Lamb was a "workman" within the meaning of the Truck Acts, and dismissed both summonses.

The question of law for the opinion of the Court was whether upon the facts the determination of the justices in either or both of the cases was right.

G. S. Robertson, for the appellant. The respondents should have been convicted. There is no question that the conditions of s. 2 of the Truck Act, 1896, under which alone deductions can be made by the employer in respect of damaged goods, were not complied with by the respondents, and the only question is whether the two women were workwomen within the meaning of s. 10 of the Employers and Workmen Act, 1875. It is submitted that they were, and that the case therefore falls within the mischief of s. 2 of the Act of 1896. By s. 2 of the Truck Act, 1887, the provisions of the Truck Act, 1831, are to

extend to, apply to, and include any workman as defined in s. 10 of the Act of 1875, and by the last-named section "the expression 'workman' does not include a domestic or menial servant, but save as aforesaid means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be . . . . express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour." Upon the facts appearing in the case it is contended that these were contracts of service, or contracts personally to execute certain work or labour; and there is abundant evidence also that the two women were "engaged in manual labour." The women alone were responsible for the work and for its safe return, and though they were not compelled to do the work themselves, they were, as the respondents knew, at liberty to do it themselves, and there was nothing in the nature of the work or in the contract for its performance which made it necessary or incumbent upon them to get the work done either wholly or partially by others. The case of *Grainger* v. *Aynsley* (1), in which a potter's printer, who was under a contract to do certain work in which he was assisted by "transferrers" engaged and paid by himself, was held to be a "workman" within the meaning of s. 10 of the Employers and Workmen Act, 1875, is a direct authority in favour of the appellant's contention, subject to the one distinction that in that case the work was done at the employer's factory, while here it was done at the workwomen's homes. In *Sharman* v. *Sanders* (2), where the person employed was held not to be a workman within the Truck Act, 1831, stress was laid on the magnitude of the work contracted to be done, and Maule J. said that the Act was "not designed for the protection of persons taking contracts for labour to be done by others, persons who speculate upon the state of the labour market." There is nothing in the present case to bring these women within the category of persons there referred to. They were not contractors, but persons engaged in manual labour.

(1) (1880) 6 Q. B. D. 182. (2) (1853) 13 C. B. 166.

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[He also cited *Stuart* v. *Evans* (1); *Brown* v. *Butterley Coal Co.* (2); *Fitzpatrick* v. *Evans* (3); *Bowers* v. *Lovekin.* (4)]

Stanger, K.C. (*Tinsley Lindley* with him), for the respondents. The decision of the justices was right; the two women were not workwomen within the meaning of s. 10 of the Employers and Workmen Act, 1875, and the case does not fall within s. 2 of the Truck Act, 1896. The test to apply is to see whether the contract is such that the contractor is bound by its terms to work personally in performance of it. The authorities establish two propositions: first, that if a contract is merely one by which a party to it engages to procure certain work to be done, the party so contracting is not a workman within the meaning of the Act, although he may in fact do all or part of the work himself; and, secondly, that, if the contract is one by which the contractor is bound to do work himself, he does not cease to be a workman by reason of the fact that he gives some of the work to others to do for him. This is clearly put in *Sharman* v. *Sanders* (5), where Maule J. says: "When the procuring work to be done by the hands of others comprehends the whole of what a man contracts for, the circumstance of his doing some portion of the work himself does not bring him within the statute." The present is such a contract as is there referred to. It is immaterial whether the contract is a large or small one.

[RIDLEY J. In *Riley* v. *Warden* (6) stress was laid in the judgment on the magnitude of the work to be done.]

The important point is that the contract must be one to do work personally, as is shewn both by *Sharman* v. *Sanders* (5) and *Riley* v. *Warden.* (6) In the present case the utmost extent of the obligation of the women under the contract was to bring back the work done; it was immaterial whose hands actually did the work. The case of *Ingram* v. *Barnes* (7) is precisely in point and is a binding authority. There a labouring man who contracted with a brickmaker to make bricks for him and find the labour, but who was not bound by the contract to

(1) (1883) 49 L. T. 138.
(2) (1885) 53 L. T. 964.
(3) [1902] 1 K. B. 505.
(4) (1856) 6 E. & B. 584.
(5) 13 C. B. 166.
(6) (1848) 2 Ex. 59.
(7) 7 E. & B. 115, 132.

do any part of the work personally, was held not to be an artificer within the Truck Act, 1831 (1 & 2 Will. 4, c. 37). The decision in *Grainger* v. *Aynsley* (1) is not in point, for in that case there was an engagement to do the work personally. [He also cited *Weaver* v. *Floyd* (2); *Ex parte Gordon.* (3)]

Robertson, in reply. The case of *Ingram* v. *Barnes* (4) is not an authority; it was decided upon a different statute using different language. [He also referred to *Pillar* v. *Llynvi Coal Co.* (5)]

Cur. adv. vult.

April 18. The written judgment of the Court (Lord Alverstone C.J., Kennedy and Ridley JJ.) was delivered by

KENNEDY J. This is an appeal on a case stated by two of the justices of Nottingham, against their dismissal of a summons against the respondents for an alleged unlawful deduction from the sum contracted to be paid by the respondents to a workwoman, Mrs. Annie Lizzie Flinders, contrary to the provisions of the Truck Act, 1896, s. 2, sub-s. 1, and against their dismissal of a like summons in the case of another workwoman, Mrs. Amy Lamb. The justices were of opinion that neither Mrs. Annie Lizzie Flinders in the one case, nor Mrs. Amy Lamb in the other case, was a workwoman within the meaning of the Truck Acts, and on that ground dismissed both summonses. After carefully considering the findings of fact stated in the case, by which we are bound, we find ourselves unable, in view of the language of the Acts of Parliament which apply to these cases and of judicial decisions which were given upon a practically identical statute, and which are binding on this Court, to hold that the determination of the justices was erroneous in point of law.

The definition of workman (which includes a workwoman) is contained in s. 10 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90). We may summarize it, for the purposes of this case, as including any person, not being a domestic or menial servant, who being engaged in manual labour has

(1) 6 Q. B. D. 182.
(2) (1852) 21 L. J. (Q.B.) 151.
(3) (1855) 25 L. J. (M.C.) 12.
(4) 7 E. & B. 115, 132.
(5) L. R. 4 C. P. 752; 38 L. J (C.P.) 294.

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entered into or works under a contract with an employer, the contract being a contract of service or a contract personally to execute any work or labour. The material facts in relation to the employment of "clippers" in the lace trade at Nottingham generally are set forth in paragraphs C to H of the case. [The learned judge read the paragraphs.] The further particular facts in regard to the two "clippers" whose cases form the subject of the present appeal are these. Mrs. Flinders never worked in the respondents' factory. She applied for and obtained work as a "clipper," and did the clipping herself at home. Mrs. Lamb was regularly employed in the respondents' factory during the day, and occasionally took home clipping work, which she knew was not considered part of the work at the factory; her daughter helped her with the clipping work at home. In neither case were the respondents aware of the person or persons who actually did the work. It was further stated by counsel that the clipping work was entered in the wages book and the women were paid weekly, subject to deductions from their pay for damaged work.

We feel ourselves precluded by authority from considering upon this statement of facts whether we might not give to s. 10 of the Act of 1875 an interpretation sufficiently liberal to include these two persons as workwomen entitled to the protection of the Truck Acts. The basis of the decision of the Exchequer Chamber in the leading case of *Ingram* v. *Barnes* (1), affirming the judgment of the majority of the Court of Queen's Bench (2), unquestionably is that to be a "workman" or "artificer" within the protection of the Truck Acts the person who contracts to do work for an employer must be a person absolutely bound by the terms of the contract to work with his own hands in the performance of it. The fact that he may work, or will probably work, with his own hands in the performance of the contract is insufficient. The principle of *Ingram* v. *Barnes* (1) was distinctly recognised in the judgment of the Court of Common Pleas in the later case of *Pillar* v. *Llynvi Coal Co.* (3), in which case Montague Smith J., delivering the

(1) 7 E. & B. 132.
(2) 7 E. & B. 115.
(3) L. R. 4 C. P. 752; 38 L. J. (C.P.) 294. [The case is reported upon this point only in the *Law Journal* report.]

judgment of the Court, said: "The result of that decision is that a man is not an artificer within the Act unless the employer has by the contract of hiring a right to require his personal work and labour in return for wages—of course as wages are defined by the Act."

In the present case the justices have found the employment of these women clippers to be the employment of persons who may execute the work or give it to other persons to execute. In fact Mrs. Flinders herself executed at home the work she got; so did Mrs. Lamb, with the assistance of her daughter. But neither of them was bound by the terms of the contract with the employer to do any part of the work personally; and this, as we have already said, appears to be established by the judgments of the Exchequer Chamber in *Ingram* v. *Barnes* (1) to be essential in order to constitute a workman under the Truck Acts. It is true that *Ingram* v. *Barnes* (1) was decided, not in regard to the Employers and Workmen Act, 1875, s. 10, but upon the interpretation of an earlier Act (1 & 2 Will. 4, c. 37); but the learned counsel for the appellants was unable to point out to us, and we have been unable to discover, any real or material distinction in the somewhat different wording of the two Acts in regard to the definition of "workman."

We must therefore dismiss this appeal. We do so with some reluctance, having regard to the facts disclosed in this case as to the nature of the employment and the position of the women clippers, who, though they do sometimes employ assistants, are evidently, as a class, wage-earning manual labourers, and not "contractors" in the ordinary and popular sense, or persons who "speculate on the state of the labour market"; and we venture to express the hope that some amendment of the law may be made so as to extend the protection of the Truck Act to a class of workpeople practically indistinguishable from those already within its provisions.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Treasury.*

Solicitors for respondents: *Hind & Robinson, for Wells & Hind, Nottingham.*

(1) 7 E. & B. 132.

W. J. B.

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May 18.

Ex parte NOVIS.

Justices—Appeal—Fine—Costs—Motor Car Act, 1903 (3 *Edw.* 7, *c.* 36), *s.* 11 —*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 5, 49.

By s. 11, sub-s. 1, of the Motor Car Act, 1903, a person guilty of an offence under that Act for which no special penalty is provided is liable on summary conviction to a fine not exceeding 20*l.*; and by sub-s. 2, an appeal to quarter sessions is given to any person adjudged to pay a fine exceeding 20*s.*

A person convicted under s. 9 of the Act of driving a motor car at a speed exceeding twenty miles an hour was fined 20*s.*, and the conviction adjudged him to pay to the clerk of the peace the sum of 1*l.*, and also pay to the informant the sum of 18*s.* for costs. An appeal to quarter sessions was dismissed on the ground that there was no right of appeal under the Act:—

Held, that a "fine" under s. 11, sub-s. 2, of the Act did not include the costs which the defendant was ordered to pay, and that therefore no appeal lay to quarter sessions.

Ex parte Motion for a rule nisi for a mandamus to the justices of the West Sussex Quarter Sessions directing them to hear an appeal against a conviction under s. 9 of the Motor Car Act, 1903, for driving a motor car at a speed exceeding twenty miles an hour.

The appellant was convicted of the offence by justices sitting as a Court of summary jurisdiction at New Shoreham, and was fined 20*s.* and ordered to pay 18*s.* costs, the order of the justices being that he was adjudged to "forfeit and pay to the clerk of the Court at New Shoreham aforesaid the sum of 1*l.*, and also pay to the said William Hooker," the informant, "the sum of 18*s.* for costs"; in default of payment the conviction stated that the appellant was to be imprisoned for fourteen days.

Notice of appeal was duly given, and the appeal came on for hearing at the Court of quarter sessions for West Sussex, when objection was taken by the respondents that no appeal lay to quarter sessions because the appellant had not been adjudged to pay a fine exceeding 20*s.*, as required by s. 11 of the Motor Car Act, 1903. The objection was upheld by

quarter sessions, and the appeal dismissed on the ground that there was no right of appeal. (1)

Avory, K.C. (*Moresby White* with him), for the applicant. For the purpose of giving a right of appeal the word "fine" in s. 11, sub-s. 2, of the Act of 1903 includes the costs which the convicted person is ordered to pay; if it were not so, it would often be possible to take away the right of appeal by allocating too large a proportion of the total amount to costs so as to prevent the amount of the fine exceeding 20*s.* It is true that in *Reg.* v. *Warwickshire Justices* (2) it was held that the word "penalty" did not include costs; but that case turned on the express words of 12 & 13 Vict. c. 92, s. 14, under which the proceedings were taken, and s. 25, which gave the right of appeal; and, further, that decision must be read subject to the provisions of the definitions contained in s. 49 of the Summary Jurisdiction Act, 1879, which was passed some years subsequently. Applying the definition of "sum adjudged to be paid" in that section, the sum adjudged to be paid in the present case was 1*l.* 18*s.*, for the amount of the costs was ascertained by the conviction; and an appeal therefore lies to quarter sessions. Further, by s. 5 of the Act of 1879, which deals with the scale of imprisonment for non-payment of money, where the sum adjudged to be paid by a conviction exceeds 10*s.* but does not exceed 1*l.*, the period of imprisonment is not to exceed fourteen days, and where it exceeds 1*l.* but does not exceed 5*l.* it is not to exceed one month. The effect therefore is that, as the sum adjudged to be paid exceeds 1*l.*, the applicant is liable to a month's imprisonment in default, although the justices affect to have imposed a fine of 1*l.* only,

(1) By 3 Edw. 7, c. 36 (The Motor Car Act, 1903), s. 11, sub-s. 2, "Any person adjudged to pay a fine exceeding twenty shillings under this Act may appeal against the conviction in the same manner as he may appeal if ordered to be imprisoned without the option of a fine."

By 42 & 43 Vict. c. 49 (The Summary Jurisdiction Act, 1879), s. 49, the expressions "sum adjudged to be paid by a conviction" and "sum adjudged to be paid by an order" respectively "include any costs adjudged to be paid by the conviction or order, as the case may be, of which the amount is ascertained by such conviction or order."

(2) (1856) 6 E. & B. 837.

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in respect of which he would only be liable to fourteen days; it is immaterial that by the conviction the period of imprisonment ordered in default is only fourteen days, if he was liable to imprisonment for a month.

LORD ALVERSTONE C.J. I am of opinion that there should be no rule. Both upon principle and authority the matter seems clear. The language of s. 11 of the Motor Car Act, 1903, is plain; it provides in sub-s. 1 that a person guilty of an offence under the Act for which no special penalty is provided is to be liable on summary conviction to a fine not exceeding 20*l.*, or on a second or subsequent conviction to a fine not exceeding 50*l.*, or in the discretion of the Court to imprisonment for a period not exceeding three months; and in sub-s. 2 it gives a right of appeal to "any person adjudged to pay a fine exceeding twenty shillings under this Act." It strikes one upon reading the section that to fix the amount of the fine which shall give a right of appeal at a sum exceeding 20*s.* is to fix it at a very small amount, seeing that a fine of 20*l.* may be imposed for a first conviction and 50*l.* for a second. In any case the costs would amount to a considerable proportion of 20*s.*, and in some cases might easily exceed it; if, therefore, the costs are to be included as part of the fine, it is obvious that in nearly every case, certainly in every case but those in which a merely nominal fine is imposed, there would be a right of appeal. Under those circumstances, ought we to hold that for the purpose of this section the word "fine" includes the costs? I am of opinion that we ought not to so hold. It has been contended that the case of *Reg.* v. *Warwickshire Justices* (1), which was decided before the Summary Jurisdiction Act, 1879, came into operation, ought, in view of the changes effected by that Act, to be the subject of further consideration; I think, however, that, if that Act has altered the law as laid down in that decision, it has done so in a sense adverse to the applicant's contention. In s. 49, which is the interpretation clause, a distinction is drawn between the expressions "fine" and "sum adjudged to be paid;" the words used are: "The

(1) 6 E. & B. 837.

expression 'fine' includes any pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction," and "The expressions 'sum adjudged to be paid by a conviction' and 'sum adjudged to be paid by an order' respectively include any costs adjudged to be paid by the conviction or order, as the case may be, of which the amount is ascertained by such conviction or order." "Fine" seems clearly to be confined to pecuniary penalties or forfeitures of which the public would get the benefit, and to pecuniary compensation to the party aggrieved, and not to include costs, of which no mention is made, and this becomes the more clear when we see that the "sum adjudged to be paid" expressly includes costs in those cases where their amount is ascertained by the conviction or order itself. It seems to me opposed to the reasonable construction of the language used in s. 49 to say that the effect of it is that a fine includes the costs, and under the Motor Car Act it is only when the "fine" exceeds 20*s.* that there is a right of appeal against a conviction. I think that the argument for the appellant is not assisted by the provisions of the Summary Jurisdiction Act, 1879.

If we turn to authority, we have one that is much in point, although it is true that it was prior in date to the Summary Jurisdiction Act, 1879, and it must of course be considered with reference to the language of the particular statute under which it was decided. *Reg.* v. *Warwickshire Justices* (1) was decided under the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 14 of which imposed on a person convicted a liability to "pay such penalty, damage, or compensation as the said justice shall according to the provisions of this Act adjudge, order, or award, together with the costs of conviction, to be settled by such justice," while s. 25 gave a right of appeal to quarter sessions "in all cases where the sum adjudged to be paid on any conviction shall exceed two pounds." In that case the Court of Queen's Bench held that the penalty did not include the costs, and that an appeal lay only where the sum adjudged to be paid as penalty, damage, or compensation, exclusive of the costs, exceeded 2*l.* There is nothing very special in the

(1) 6 E. & B. 837.

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language used in that particular statute, but it seems at least as wide as that used in the Summary Jurisdiction Act, 1879. There only remains for consideration s. 11 of the Motor Car Act, 1903, which in giving an appeal to quarter sessions definitely limits it to cases where the "fine" imposed exceeds 20*s*. That limit is a very low one, and, apart from the consideration that no statutory enactment compels us to interpret the word "fine" as including costs, it would be going too far if we were to hold that an appeal lay where the limit of amount is fixed so low that the imposition of costs would give a right of appeal in every, or almost every, case. The matter is in my judgment so clear that we ought not to grant a rule.

KENNEDY J. I agree.

RIDLEY J. I agree.

Rule refused.

Solicitors for applicant: *Firth & Co.*

W. J. B.

Applied. NORTH CENTRAL WAGON AND FINANCE CO., LTD. *v.* GRAHAM. [1950] 1 All E.R. 780.

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May 18.

JELKS *v.* HAYWARD.

(HACKNEY FURNISHING COMPANY, CLAIMANTS.)

County Court—Execution—Seizure and Sale of Goods not the Property of Judgment Debtor—Claim made by Owner after Sale—Liability of High Bailiff to Owner.

Furniture was let for hire with an option of purchase under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring and retake possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county court, and, no claim having been made to it, was appraised and sold under the execution and the proceeds paid into court, and the furniture delivered to the purchaser. On the day after the sale the owners heard for the first time of the seizure and sale of the furniture, and gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, and in the course of the interpleader proceedings the execution creditor admitted the title of the claimants, who gave a notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling it:—

Held, that, as under the hiring agreement the claimants had a right to

retake possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them.

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APPEAL from a decision of the judge of the Southend County Court upon the trial of certain interpleader proceedings.

On March 25, 1904, the defendant entered into an agreement with the claimants, the Hackney Furnishing Company, for the hire, with the option of purchase, of certain articles of furniture for the sum of 93*l.*, payable by weekly instalments of 12*s.* 6*d.*; the agreement contained a clause that if the articles or any of them should be seized or taken in execution the company might without previous notice terminate the hiring and retake possession of them. On April 21 the plaintiff recovered a judgment in the county court against the defendant; on June 1 a warrant of execution was issued; and on June 7 the high bailiff levied upon the defendant's goods, including the furniture comprised in the hiring agreement. No claim having been made to the goods seized, they were duly appraised, and on June 18 were sold under the execution, and the proceeds received by the high bailiff and paid by him into court. On the following day, June 19, the claimants for the first time became aware of the seizure and sale of the furniture comprised in the hire-purchase agreement, and on June 21 they formally demanded the proceeds of the sale. An interpleader summons was thereupon issued upon the application of the high bailiff, and in July the execution creditor admitted the claim of the claimants. On August 29 the claimants gave notice, under Order XXVII., r. 8, of the County Court Rules, claiming damages against the high bailiff, the grounds of the claim being that he "seized and took away the goods and chattels, the property of the claimants, and converted them to his own use." The learned county court judge was of opinion that the claimants were entitled to recover damages from the high bailiff, which he assessed at 32*l.* 10*s.*, and the high bailiff appealed.

Montague Lush, K.C. (*H. B. Edge* with him), for the appellant. The decision of the county court judge was wrong, and

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the high bailiff is entitled to succeed on this appeal. First, it is clear upon the face of the hiring agreement that the right of the claimants to possession of the furniture did not relate back to the act of forfeiture on the part of the hirer—that is, to the seizure under the execution. Clause 7 provides that the claimants may terminate the hiring and retake possession of the goods if they are seized or taken in execution; but this provision does not ipso facto revest the property in the claimants upon the goods being taken in execution; it only gives the owners the right to interfere in such a case if they like to do so. The right does not arise until after the seizure, and therefore the action of the high bailiff in seizing did not prevent the owners exercising their right of determining the agreement of hire and retaking possession. The high bailiff, therefore, did not convert the goods by taking them in execution, and having once seized them he was under a statutory duty to sell them, which would override the right of the claimants. Under the particular contract the hiring is not determined until the owner of the goods does something to determine it; there was no immediate right of possession upon seizure by the high bailiff.

Secondly, under the County Courts Act, 1888, the high bailiff, having once seized the goods, was obliged to sell them, and is entitled to the protection of the statute. It is true that in *Crane* v. *Ormerod* (1) it was held that a purchaser acquired no title to goods sold by a bailiff to which no claim had been made, but which turned out not to be the property of the execution debtor; but that case is distinguishable, for it seems to have been conceded that the original seizure by the bailiff was tortious. The reasoning of the decision in *Goodlock* v. *Cousins* (2) is applicable to the present case, though no doubt in that case the sale was made by the bailiff under s. 156 of the Act because the claimant of the goods seized had not paid the necessary deposit, while the present case is merely the ordinary one of seizure and sale without any notice of claim; but if the seizure is lawful (as in the present case it clearly was) the high bailiff is just as much under a statutory obligation to sell the goods as he is where a claim has been made and the

(1) [1903] 2 K. B. 37. (2) [1897] 1 Q. B. 348, 558.

claimant has failed to make the deposit. The sale is the act of the law under the precise code as to executions contained in ss. 146–157 of the County Courts Act, 1888. If the high bailiff had not sold he would have been liable to an action by the execution creditor.

W. de B. Herbert (*Foote, K.C.*, with him), for the claimants. The high bailiff is liable in damages for conversion of the goods of the claimants. The tort was the wrongful sale of the furniture. The original seizure under the execution was a trespass which under the provisions of the hiring agreement gave the claimants a right to the immediate possession of the furniture, and the subsequent sale by the high bailiff was a conversion of goods of which both the property and the right to possession were in the claimants. The authorities are all in favour of the view that, where the true owner has the right to the possession of goods seized under an execution against another person in actual possession of them at the time of the seizure, a sale under the execution gives the owner a right to sue in trover. In *Pain* v. *Whittaker* (1) it was held that the owner could not sue the sheriff for the reason that he had not the right of possession as well as the right of property at the time of the sale of the goods seized in execution, while in *Dean* v. *Whittaker* (2), where it was also held that an action would not lie, it was expressly stated that no steps had been taken for the sale of the goods under the execution. In *Manders* v. *Williams* (3), where the owner of casks seized under an execution had an immediate right of possession, it was held that he could maintain trover against the sheriff who sold the casks under the execution. It is clear from *Crane* v. *Ormerod* (4) that the sale was wrongful, as the purchaser would not have been protected by it.

[KENNEDY J. How do you distinguish *Bradley* v. *Copley* (5)? There was there a sale of the goods seized under the execution, but it was held that the owner could not maintain trover against the sheriff.]

(1) (1824) Ry. & Mood. 99.
(2) (1824) 1 C. & P. 347.
(3) (1849) 4 Ex. 339.
(4) [1903] 2 K. B. 37.
(5) (1845) 1 C. B. 685.

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In that case the judgment of Cresswell J. shews the ratio decidendi to have been that the bill of sale did not give the bill of sale holder a right of immediate possession, such as was necessary to enable him to maintain trover against the sheriff for selling. [He also cited *Mulliner* v. *Florence* (1); *Lancashire Wagon Co.* v. *Fitzhugh.* (2)]

Edge, in reply. Under the hiring agreement there was merely an option in the claimants on seizure of the goods in execution to determine the hiring; the case is not the ordinary one where the seizure ipso facto determines the hiring agreement.

LORD ALVERSTONE C.J. This case raises a question of some difficulty, but I have come to the conclusion that we ought not to interfere with the decision of the learned county court judge. Proceedings were taken against the high bailiff for seizing goods which were not the property of the judgment debtor, but had been hired by him, under a hire and purchase agreement, from the claimants, and it must be taken as the basis of the judgment that the goods were the claimants' property. The right to their possession depended on the terms of the hire-purchase agreement. I adhere to the view which we expressed in this Court in *Crane* v. *Ormerod* (3) that there is no special privilege in favour of a high bailiff which does not apply in the case of a sheriff. Subject to questions which may arise upon the special provisions of s. 156 of the County Courts Act, 1888, I think that the liability of a high bailiff who sells goods taken in execution is the same as that of a sheriff, and that there is nothing in that Act to shew that the high bailiff has any special protection where he innocently seizes and sells the goods of a third party.

Apart from the case made upon s. 156, it is contended on behalf of the high bailiff that proceedings against him are not maintainable because, although the goods were the property of the claimants, they were held under an agreement which gave the claimants the right to terminate the hiring and retake

(1) (1878) 3 Q. B. D. 484. (2) (1861) 6 H. & N. 502.
(3) [1903] 2 K. B. 37.

possession without previous notice upon the goods being seized or taken in execution. If the authorities are not too strong for the contention that possession has been given to the hirer by the owner of the goods until he retakes possession, then, as possession has not been retaken, and as no proceeding will lie against the high bailiff for the mere seizure of the goods, the contention will have been made good that the high bailiff is not liable. After considering the authorities dealt with by the county court judge in his judgment, I have come to the conclusion that in this Court, at any rate, we must hold that if the high bailiff sells goods, of which the owner is entitled at the time of sale to retake possession, he is liable in trover. It is unnecessary for me to deal at length with the string of cases cited, beginning with *Dean* v. *Whittaker* (1), because the county court judge fully recognises that, if it were a mere question of seizing the goods and holding them, the high bailiff might be protected, inasmuch as up to a certain point the owner of the goods was not entitled to possession. For instance, where goods are hired for a year, or the judgment debtor has an interest in goods for a limited term, the high bailiff would have the right to sell the judgment debtor's interest, and the owner of the goods, being ex hypothesi not entitled to possession, could not maintain trover in respect of them. I need only refer to the passage in the judgment of Bayley J. in *Dean* v. *Whittaker* (2), in which he said that the sheriff might have sold the interest of the judgment debtor in the goods. Having recognised that to be the law, the county court judge dealt with the cases of *Bradley* v. *Copley* (3) and *Manders* v. *Williams*. (4) To my mind, the effect of the decision in the latter case is that, if at the time of the sale the owner is entitled to take possession, the sale is an act of conversion as against him, and I am unable to see that the right to sue in trover depends upon any notice given to the sheriff or high bailiff. It is a branch of the general law that the sheriff seizes and sells goods at his peril, and I see no reason why a county court bailiff is in that respect in any better position than the sheriff.

(1) 1 C. & P. 347.
(2) 1 C. & P. 347, at p. 349.
(3) 1 C. B. 685.
(4) 4 Ex. 339.

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Reference was also made to *Bradley* v. *Copley* (1), which, when carefully examined, seems to me to differ from *Manders* v. *Williams* (2), because, although there had been a sale, there had been no demand entitling the owner of the goods to resume possession. That must, I think, be the true distinction between the cases, because in *Manders* v. *Williams* (2) that very learned lawyer, Parke B., when dealing with *Gordon* v. *Harper* (3) and *Bradley* v. *Copley* (1), recognised that a person not entitled to possession cannot maintain trover (which is the first branch of the appellant's argument in the present case), and then went on to say that, inasmuch as the owners of the casks were entitled to their possession when they were empty, the right of possession reverted to them, and the person in whose actual possession they were was in the position of a mere bailee during pleasure, and the action could therefore be brought by the bailor. It has been suggested during the present argument that the fact that the hirer was going to pay for the goods made a distinction, and that the rule was not the same where the person in possession of the goods was not a gratuitous bailee during pleasure. In my opinion that fact cannot make any real difference if by the terms of the hiring agreement there is the right to take possession. As I have already said, I think that under the present hiring agreement, as the owner had the right to take possession of the goods immediately upon their being seized in execution, it does not matter, so far as he is concerned, whether the antecedent period was covered by a payment of rent, the rent ceasing, of course, upon possession being taken. I have therefore come to the conclusion that at the time of the sale the owners of the goods had the right to possession, and therefore that *Manders* v. *Williams* (2) is an authority that is fatal to the contention of the appellant.

Reliance was placed upon the sections of the County Courts Act, 1888, dealing with the rights and duties of high bailiffs, as shewing that in the present case the high bailiff was protected; but no particular section affording that protection could be

(1) 1 C. B. 685. (2) 4 Ex. 339.
(3) (1796) 7 T. R. 9; 4 R. R. 369.

pointed out other than s. 156, which was discussed in *Goodlock* v. *Cousins*. (1) I think that the view of that case which we took when it was considered by this Court in *Crane* v. *Ormerod* (2) was correct. All that the Court decided was that, where the procedure of s. 156 had been followed, and the claimant, having given a notice of his claim pursuant to that section, afterwards failed to fulfil the conditions imposed by that section upon a claimant, it was not for him to say that the sale was wrongful and that the purchaser did not acquire a good title to the goods sold. There is nothing in that decision which conflicts with the general principle sanctioned by a multitude of authorities that, if a sheriff or a county court bailiff sells goods under an execution which are not in fact the goods of the execution debtor, and if the true owner has a right to the possession of those goods, the sheriff or high bailiff is liable in an action of trover. For the reasons which I have given, this appeal must be dismissed.

KENNEDY J. I am of the same opinion, and only wish to add a few words to explain the grounds of my decision. No doubt sheriffs and high bailiffs have frequently to act under circumstances which make their position one of great difficulty, but the sympathy we may feel for their position cannot prevent us from applying well-established principles of the law of tort, where their action, however honest and well-meaning, has placed them in the position of being wrong-doers. In the present case it is indisputable that the high bailiff has sold the goods of the claimants; he sold them because he had seized them under an execution, the seizure being lawful. Whatever interest the apparent possessor, the execution debtor, had in the goods seized, he had by the terms of the hire-purchase agreement between him and the respondents; it was an interest terminable ipso facto on the occurrence of such a seizure as actually took place; in other words, the respondents became entitled to the possession of the goods without notice or demand immediately upon that act of seizure by the bailiff. In order to maintain an action of conversion for the subsequent

(1) [1897] 1 Q. B. 348, 558. (2) [1903] 2 K. B. 37.

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sale by the bailiff, there must be a right in the plaintiff to immediate possession of, as well as a property in, the goods. In the present case there is no question that the goods sold were the property of the respondents: had they also a right to their possession at the time of the sale? In my opinion they had, because the act of the bailiff in seizing entitled them to take possession of the goods immediately upon the seizure. The respondents had not only the property in the goods, but also the right to possession at the time of the sale, and therefore it seems to me plain upon principle that, unless he is protected by some provision in the County Courts Act, 1888 (and it is not suggested that he is protected by any other legislation), the high bailiff, although he acted as he did in obedience to what he believed to be his duty, is in the position of a person who has converted the goods of another by selling them. The fact that there has been no demand or act of retaking cannot avail the high bailiff when the person who has the right to retake is unaware that a state of circumstances has arisen which gives him that right. The sale by the high bailiff put an end to the power of the respondents to retake at all, and a person who, by selling goods to a third person or by destroying them, puts it out of the power of another, who has a right to the possession of the goods as well as the right of property in them, to exercise those rights, becomes, in my opinion, liable in tort.

Is there any provision of the County Courts Act, 1888, which protects the high bailiff? I am unable to find any. Sect. 156, which was the section under consideration in the Court of Appeal in *Goodlock* v. *Cousins* (1), does not apply to the present case, for the machinery of that section was never brought into active working at all.

RIDLEY J. I am of the same opinion for the same reasons.

Appeal dismissed.

Solicitors for appellant: *Todd, Dennis & Lamb.*
Solicitors for respondents: *Syrett & Sons.*

(1) [1897] 1 Q. B. 348, 558.

W. J. B.

THE KING *v.* DRINKWATER AND OTHERS, LICENSING JUSTICES (WINCOTT'S CASE).

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May 16.

Licensing Acts—Removal of Licence—Power of Licensing Justices to attach Conditions—Monopoly Value—Licensing Acts, 1872 (35 & 36 *Vict. c.* 94), *s.* 50; 1874 (37 & 38 *Vict. c.* 49), *s.* 22; 1904 (4 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 2.

Sect. 4, sub-s. 2, of the Licensing Act, 1904, giving licensing justices power to attach conditions to the grant of a new on licence in order to secure to the public the monopoly value, does not apply to an order for the removal of a licence, and licensing justices therefore have no power to attach those conditions to the making of an order for removal.

RULE NISI, calling upon seven justices of the peace in and for the city of Coventry, being the licensing committee for the same city, to shew cause why a writ of mandamus should not issue directed to them commanding them to hold within a reasonable time an adjournment of the general annual licensing meeting, and at such adjournment to hear and determine the matter of an application by Arthur Augustus Wincott that the licence theretofore granted in respect of a house and premises in Far Gosford Street, Coventry, known by the sign of the Hare and Hounds, might be removed to a house about to be erected upon a piece of land situate at Bramble Street, Coventry.

The following facts appeared from the affidavit, made by Mr. Wincott, upon which the rule was obtained:—

At the general annual licensing meeting, held on February 8, 1905, Wincott applied to the justices for an order, under s. 50 of the Licensing Act, 1872, and s. 22 of the Licensing Act, 1874 (1), for the provisional removal of the existing full on

(1) The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 50: "Licences may be removed from one part of a licensing district to another part of the same district, or from one licensing district to another licensing district within the same county, in manner following:—

"The application for an order sanctioning removal shall be made by the person desiring to be the holder of the licence when removed, and shall be made at a general annual licensing meeting, or any adjournment thereof, to the justices authorized to grant new licences in the licensing district

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licence of the Hare and Hounds inn, of which he was the owner, to a house and premises about to be erected and con-

in which the premises are situated to which the licence is to be removed:

"Notice of the intended application shall be given in the same manner as notice is given of an application for the grant of a new licence:

"A copy of the notice shall be personally served upon or sent by registered letter to the owner of the premises from which the licence is to be removed, and the holder of the licence, unless he is also the applicant:

"The justices to whom the application is made shall not make an order sanctioning such removal unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom such justices shall determine to have a right to object to the removal:

"Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant new licences; but no such order shall be valid unless confirmed by the confirming authority of the licensing district."

By s. 74, "'a new licence' means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors." [Repealed by Licensing Act, 1874, s. 33, and definition in s. 32 substituted.]

The Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 22, provides for the provisional grant and confirmation of licences to premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors to be consumed on the premises, and enacts that "a provisional grant and confirmation of a licence shall be subject to the same conditions as to the giving of notices and generally as to procedure to which such grant and confirmation would be subject if they respectively were not provisional" (with an exception as to putting up notices), and that "this section shall, with the necessary variations, extend to the provisional removal to any premises of an existing licence under s. 50 of the principal Act."

By s. 32, "'a new licence' means a licence for the sale of any intoxicating liquor, granted at a general annual licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted."

The Licensing Act, 1904 (4 Edw. 7, c. 23), s. 4, sub-s. 2, enacts: "The justices on the grant of a new on licence may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows:—

"(a) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed and the value of the same premises if they were not licensed:...."

By s. 9, sub-s. 4, "The expression 'on licence' means a licence for the sale of intoxicating liquor (other than wine alone or sweets alone) for consumption on the premises, and the expression 'new on licence' shall be

structed at Bramble Street on land of which he was one of the owners. The justices refused the application, their decision, as read out by their clerk, being as follows:—

"We are of opinion that, upon the facts proved, the removal of the licence of the Hare and Hounds to the proposed new site would be of public advantage, and should be permitted by the licensing justices. Acting, however, upon the opinion of their legal adviser, the licensing justices consider they cannot make the order asked for of provisional removal except upon an application for a new licence."

This rule was thereupon obtained on behalf of Wincott, the prosecutor.

An affidavit in opposition to the rule was sworn by Mr. A. H. Drinkwater, chairman of the licensing committee, and contained the following statements:—

"Upon the evidence before us we considered that a case had been made out for the provisional grant of a licence to premises to be constructed in Bramble Street, and that the removal or doing away with the licence to the said premises in Far Gosford Street would be an advantage. Although we had no specific evidence on the point we were satisfied from our own knowledge of the district that the removal of the licence from the premises in Far Gosford Street to the premises to be constructed in Bramble Street would be a very great pecuniary gain to the applicant, and we were not disposed to make an order sanctioning the removal of the licence unless the pecuniary gain so acquired should be secured in the interests of the public. It was contended on behalf of the applicant that we had no power to attach any conditions as to requiring payment of the monopoly value on the making of an order sanctioning the removal of the licence. We were, however, advised that we had the same power to make an order sanctioning the removal of such licence as we have to grant a new licence; and as

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construed accordingly; and the expression 'existing on licence' means an on licence in force at the date of the passing of this Act and includes a licence granted by way of renewal from time to time of a licence so in force, whether such licence continues to be held by the same person or has been or may be transferred to any other person or persons."

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licensing justices in the grant of a new on licence have power to attach to the grant of the licence such conditions, both as to payments to be made and as to any other matters, as they think proper in the interests of the public, we consider that an order sanctioning the removal of such on licence should not be made unless some such conditions should be attached to the order requiring (inter alia) a payment to be made by the applicant. We did not go into the question of amount as we had no evidence before us to enable us to fix what the amount should be. As the applicant wished an order sanctioning the removal free of all conditions as to payment, we refused the application."

At the general annual licensing meeting Wincott applied for a new licence in respect of the house and premises intended to be built and constructed in Bramble Street, but he afterwards withdrew that application.

Avory, K.C., and *W. Mackenzie*, for the respondents, shewed cause. The justices had, under s. 4, sub-s. 2, of the Licensing Act, 1904, the same power to attach conditions to the making of an order, or provisional order, for the removal of the existing on licence to new premises as they would have had if the application had been for a new on licence. They could, therefore, attach conditions for securing to the public the monopoly value in respect of the new premises—a power given to licensing justices for the first time by that Act. In the Licensing Acts of 1872 and 1874, the removal of a licence to new premises is put upon the same footing as the grant of a new licence. In s. 50 of the Act of 1872, the application can only be made to justices sitting to grant new licences; the same notices are to be given as in applications for new licences, and the last clause of the section provides that "subject as aforesaid"—i.e., subject to the justices being satisfied that no objection to the removal is made by persons entitled to object—"the justices shall have the same power to make an order sanctioning such removal as they have to grant new licences." The definitions of "new licence" in s. 74 (now repealed) and in the Act of 1874, s. 32, completely cover the case of a removal of a licence. The definition of the expressions "on licence," "new on licence," and

"existing on licence" in s. 9, sub-s. 4, of the Licensing Act, 1904, is not material on this question. By s. 22 of the Act of 1874, a provisional removal is put on the same footing as a removal under s. 50 of the Act of 1872, and is subject to the same conditions as to procedure, &c. The intention of the Legislature in passing s. 4, sub-s. 2, of the Act of 1904 was to give the justices power to attach the condition of a pecuniary payment both in the case of an order for the removal of the licence and in the case of the grant of a new licence where none had existed before; but in the one case, their discretion is unfettered; in the other, it is fettered.

[LORD ALVERSTONE C.J. referred to *Reg.* v. *Bowman and Others* (1), where the Queen's Bench Division held that licensing justices could not annex to the grant of a licence a condition for the payment of money by the applicant.]

Pickford, K.C. (*Bruce Williamson* and *H. Maddocks* with him), for the prosecutor, supported the rule. Sect. 4, sub-s. 2, of the Licensing Act, 1904, does not enable licensing justices to attach the condition of a pecuniary payment on making an order for the removal of a licence. That sub-section does not apply to orders of removal at all. The words "on the grant of a new licence" shew that clearly. For more than thirty years a statutory distinction has been drawn between granting removal orders and granting new licences, and that distinction is preserved in the Act of 1904. The Intoxicating Liquors (Licences Suspension) Act, 1871 (34 & 35 Vict. c. 88) (repealed) may be looked at in order to follow the history of this legislation. It imposed restrictions during a limited time upon the granting of "new licences" otherwise than by way of renewal (s. 1); but it gave the licensing justices (s. 2) a discretion to "remove" licences, the grant of "new licences" and the "removal" of existing licences being thus kept quite distinct. The Licensing Act, 1872, gave back to the justices the full power of granting new licences, and gave them power to make orders sanctioning the removal of existing licences. Sect. 50 is the enabling section with respect to orders sanctioning removal, and the words, "Subject as aforesaid, such justices

(1) [1898] 1 Q. B. 663.

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shall have the same power to make an order sanctioning such removal as they have to grant new licences," were probably thought necessary in order to give them the same kind of discretion as in the case of a grant of a new licence. In the present case the prosecutor withdrew his application for the grant of a new licence in respect of the house about to be built, and the justices had no power to treat his application for a removal as though it were an application for the grant of a new licence: see *Laceby* v. *Lacon & Co.* (1), where the distinction between removals and the granting of new licences is emphasized in the judgments delivered in the House of Lords.

LORD ALVERSTONE C.J. I am of opinion that this rule should be made absolute. If the ground of the justices' decision was, as stated in the affidavit in support of the rule, that they could not make an order for the provisional removal of the licence in question except as upon an application for a new licence, the matter would be almost too clear for argument, because their decision would be that the old law in regard to removals of licences was altered, and that an application to remove the licence to a place which had not been previously licensed could only be dealt with as an application for a new licence. Such a decision would obviously go too far. It would be going much too far to say that in every case of an application to remove a licence no questions as to the value of the property, or as to new and improved conditions in respect of the new premises, or as to the desirability of removing the licence from a place where there are too many licensed houses to a place where there are few or none, and the like, may be considered, but that the application must be dealt with only as though it were an application for a new licence, and the fact that there was an existing licence must be wholly disregarded. To say that would, in my view, be to repeal the whole of the legislation in respect of the removal of licences. I confess I have difficulty in reconciling the affidavit made by one of the justices with the minute of their decision read out by their clerk; but it may be, as has been suggested, that they

(1) [1899] A. C. 222.

meant to say that they thought they were bound to deal, or had power to deal, with the application for a removal order upon the same basis and from the same point of view as if it were an application for the grant of a new licence, and that they were bound to impose, or entitled to impose, conditions upon the applicant for a removal in order to secure a pecuniary gain for the benefit of the public. Whichever view they took, however, the state of the law as regards this matter is, in my opinion, this: There have been parallel lines of legislation—one with respect to orders sanctioning the removal of licences, and the other with respect to granting new licences. I agree that to a great extent the same considerations had to be applied to the one as to the other exercise of jurisdiction. In both cases it was necessary to consider the convenience of the public, the fitness of the premises, the fitness of the applicant, and other like matters. It is true that s. 50 of the Licensing Act, 1872, says that, "Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant new licences"; but I think there is something in the view that, s. 50 being the enabling section, some such words were required, and the insertion of them does not, to my mind, warrant the contention that "the same power" means that the justices' power is to make an order sanctioning a removal under all the circumstances and exactly in the same way as in the case of a new licence. Again, s. 22 of the Licensing Act, 1874, which enabled orders to be made for provisional removal, does not seem to me to destroy the argument that the legislation has run on parallel lines in respect of the power of making orders for removal and provisional removal and in respect of grants of new licences, and that an absolute discretion has been preserved to the justices with regard to making these removal orders. Passing to the Licensing Act, 1904, it involves difficulties of construction which must be solved to a large extent by keeping in view its main object and intent, which were to give a value to existing licences, to secure them to the holders, and to secure for the benefit of the public the monopoly value of new licences. Sect. 4, sub-s. 2, provides that the justices, "on the grant of a

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new on licence," may attach conditions to the grant. The language, therefore, does not in terms include within its operation an order sanctioning the removal of a licence, and it is a fair argument that, if the Legislature had meant to bring both classes of jurisdiction within the operation of that one section and make them subject to one condition, you would expect to find express words in the section, such as "either on the grant of a new on licence, or on the removal of an existing on licence"; and the interpretation clause (s. 9, sub-s. 4) to some extent supports that view, because, in defining what is a "new on licence" and an "existing on licence," it draws a clear distinction between licences which were not in existence at the date of the passing of the Act and licences which were in existence at that date. There is another consideration which, though not conclusive, has some weight in enabling us to determine whether s. 4, sub-s. 2, relates to and includes the case of a removal of the licence. Clause (*a*) of sub-s. 2 deals with the question of the monopoly value, represented by the difference between the value the premises will bear, in the opinion of the justices, when licensed and the value of the same premises if they were not licensed. It is difficult to see how, if that is the problem to be dealt with and solved, the element that an existing on licence has been removed from another house can properly enter into the calculation. In the case of the removal of an existing licence the public cannot be intended to get the monopoly value in respect of the new house as if there had been no licence in existence; they are only entitled to the monopoly value on the grant of a new licence. That, in my opinion, points to the conclusion that an order sanctioning the removal of an existing licence involves different considerations from those which arise with respect to the grant of a new licence, and supports the argument that the words "on the grant of a new on licence" ought not to be construed as equivalent to "on the removal of an existing licence," simply because by earlier legislation the same powers were given to justices to make orders for removal as were given to them to grant new licences.

I am, therefore, of opinion that upon an application for the

removal of a licence the justices have not the power to impose the conditions given to them in respect of granting new licences by s. 4, sub-s. 2, of the Licensing Act, 1904. I wish, however, to say that I do not indicate or suggest that the justices have not a discretion as to whether they will, or will not, make an order sanctioning the removal; and, speaking for myself, I think they are entitled and ought to take into consideration the circumstance, if it exists, that by making the order a great pecuniary gain would be conferred upon the applicant, and the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence. It must not be thought, therefore, that I suggest that the justices have not a discretion to refuse to make a removal order upon that ground amongst others. It is a matter for them to take into consideration; but they must consider it with reference to the question of making or refusing the removal order, and they must not attach conditions which they have no power to attach under the statute. The rule must be made absolute, and the justices must deal with the question of making or refusing the order for removal on its merits when it comes before them.

KENNEDY J. I am of the same opinion. I agree with my Lord that our decision must not be taken as suggesting in any way that the justices have not a discretion with respect to the granting or refusing of the application to remove the licence. I agree so fully with the rest of my Lord's judgment that I need add nothing more.

RIDLEY J. I agree.

Rule made absolute.

Solicitors for prosecutor: *Godden, Son & Holme, for Band & Hatton, Coventry.*

Solicitors for respondents: *Nicholson, Graham & Graham, for Montague Wilks, Coventry.*

W. A.

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THE KING *v.* COX AND OTHERS, LICENSING JUSTICES.
Ex parte WEST.

Licensing Acts—Justices—Jurisdiction—Renewal of On Licences—Reference of Question of Renewal to Quarter Sessions—Notice to Licensed Person—Evidence on which Justices entitled to act—Licensing Acts, 1872 (35 & 36 *Vict. c.* 94), *s.* 42; 1904 (4 *Edw.* 7, *c.* 23), *s.* 1.

Sect. 1, sub-s. 1, of the Licensing Act, 1904, provides that the power to refuse the renewal of an existing on licence on grounds other than certain specified grounds (which do not include the ground that the licensed house is not required for the needs of the neighbourhood) shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from the justices and on payment of compensation. Sub-s. 2 provides: "Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon."

At an adjournment of the general annual licensing meeting the renewal of an existing on licence was objected to on the ground that the licensed house was not required for the needs of the neighbourhood. An inspector of police gave evidence on oath as to the number of licensed houses within a short distance of the house in question, the amount of population, and the character of the neighbourhood. The licence-holder had been served with notice to attend, and was present, but called no evidence. The justices had been supplied with plans of all the licensed houses in the district, and were acquainted with the locality and accommodation of the house in question and of the other licensed houses in the neighbourhood, and, acting upon the evidence and upon their own knowledge, they referred the question of the renewal of the licence to quarter sessions, with their report thereon:—

Held, that there was evidence upon which the justices could form the opinion that the question of the renewal of the licence required consideration, and refer the matter to quarter sessions under sub-s. 2.

Licensing justices cannot refer to quarter sessions, under s. 1, sub-s. 2, the question of the renewal of an existing on licence if no notice of objection has been given to the licence-holder, and he has not been given the opportunity of attending at the hearing of his case before the justices and of tendering evidence.

Where the ground of objection to the renewal of a licence is that the

licensed house is not required for the needs of the neighbourhood, the justices must have some evidence on oath that it is not so required before they can form the opinion that the question of the renewal requires consideration on that ground. It is not necessary, however, in all cases, that they should have before them detailed evidence differentiating the house in question from the other licensed houses in the neighbourhood; nor are they bound in forming their opinion to exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, and the habits of the inhabitants.

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RULES NISI, obtained on behalf of the prosecutor, A. J. Farrell, calling on the licensing justices of the Penge Division of the county of Kent (1.) to shew cause why a writ of prohibition should not be issued prohibiting them from further proceeding in the matter of referring to the quarter sessions of Kent an application by the prosecutor for the renewal to him of a licence for the sale of intoxicating liquors at the Duke of Edinburgh beerhouse, and (2.) to shew cause why a writ of mandamus should not issue directed to the licensing justices commanding them to hold within a reasonable time a further adjournment of the general annual licensing meeting, and at such further adjournment to proceed to hear and determine, pursuant to the statutes in that behalf, the application of the prosecutor for the renewal of his licence in respect of the same beerhouse. (1)

(1) The following are the statutory provisions affecting the questions raised in both cases:—

The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42: "Where a licensed person applies for the renewal of his licence the following provisions shall have effect:—

"(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend.

"(2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard, and the objection considered, as if the notice hereinbefore prescribed had been given.

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The material facts appearing from affidavits sworn in support of and in opposition to the rules were as follows:—

The prosecutor was the holder of a licence for the sale by retail of beer to be consumed on the premises at the Duke of Edinburgh beerhouse in the Penge Division of Kent. The licence had been held by him for about three years, and was in force after the passing of the Licensing Act, 1904

"(3.) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath.

"Subject as aforesaid, licences shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

The Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 26, provides that the requisition to attend to be given under the principal Act shall not be made "save for some special cause personal to the licensed person to whom such requisition is sent," and that "a notice of an intention to oppose the renewal of a licence served under s. 42 of the principal Act shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed."

The Licensing Act, 1904 (4 Edw. 7, c. 23), s. 1: "(1.) The power to refuse the renewal of an existing on licence, on any ground other than the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act. . . .

"(2.) Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may, if they think it expedient, after giving the persons interested in the licensed premises and, unless it appears to quarter sessions unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the justices of the licensing district), an opportunity of being heard, and subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

Rule 41 of the Licensing Rules, 1904, made by the Secretary of State under the Act, provides for a provisional renewal of the licence where the question of the renewal is referred to the compensation authority under s. 1, sub-s. 2, of the Act.

and was an "existing on licence" within the meaning of that Act.

At the general annual licensing meeting for 1905 the justices decided to renew the licences in respect of some of the licensed houses, and to adjourn the consideration of the cases of the other licensed houses, including the Duke of Edinburgh beerhouse, and they directed that in those cases notices should be given to the licence-holders to attend at the adjourned meeting and apply for the renewal of their respective licences. Those notices were duly given, the "special cause" alleged in the notices being "that such licence is not required for the needs of the neighbourhood and is therefore unnecessary."

The prosecutor attended at the adjourned meeting and applied for the renewal of his licence in respect of the Duke of Edinburgh beerhouse. The justices announced that they had decided to renew the licences in nine of the cases then under consideration, and that they would proceed to further consider and decide the remaining five cases, including the case of the Duke of Edinburgh beerhouse, which they then proceeded to hear. An inspector of police, who had been asked by the justices to make certain inquiries, gave evidence on oath with respect to the number of licensed houses within a short radius of the prosecutor's house, the amount of population, and the character of the neighbourhood. No evidence was called on behalf of the prosecutor.

After hearing the inspector's evidence the justices further adjourned the consideration of the five cases, and ultimately decided to renew the licenses of the Duke of Edinburgh beerhouse, and of the other four houses provisionally, and to refer those cases, with their reports thereon, to quarter sessions, under the provisions of the Licensing Act, 1904, on the ground that the houses were not required for the needs of the neighbourhood.

These rules were thereupon obtained.

In an affidavit made by Mr. Tolhurst, the chairman of the justices, in opposition to the rules, he stated that the consideration of the question of the renewal of licences in the Penge Division had for a considerable time been under the notice of

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the justices, and that they were provided with plans of all the licensed houses as required by the licensing laws; that the whole of the houses in the district had been visited by some of the justices; that he himself was familiar with the licensed houses in the division and knew the Duke of Edinburgh beerhouse, and was fully acquainted with its accommodation and locality as well as with the accommodation of the licensed houses in its neighbourhood; that the house had also been brought to his notice whilst sitting as a justice at petty sessions; that he could not exclude his knowledge from his consideration in deciding whether the case of the Duke of Edinburgh beerhouse should be referred to quarter sessions on the ground that the house was not wanted for the needs of the neighbourhood; and that in forming his opinion as to the Duke of Edinburgh beerhouse he was actuated solely by the evidence given by the inspector of police, and by the knowledge which he (the deponent) possessed of the houses in the neighbourhood both as to their character, situation, and structural suitability, and the manner in which, from his actual knowledge, the Duke of Edinburgh compared with the other houses in the neighbourhood whose licences were renewed.

An affidavit was made by the other justices in which they deposed that they concurred in Mr. Tolhurst's affidavit, and that the facts therein stated were those upon which they also formed their opinion.

Avory, K.C. (*G. F. Hohler* with him), shewed cause against the rules. Licensing justices are not a tribunal to which a writ of prohibition will go. They are not a Court, and act only in an administrative and not in a judicial capacity, and in acting under s. 1, sub-s. 2, of the Licensing Act they are not "imposing an obligation" upon the applicant for renewal within Brett L.J.'s words in *Reg.* v. *Local Government Board.* (1) The question raised in the present case, however, may probably be raised by mandamus. It is said that the justices have not heard and determined according to law because there was no evidence before them upon which they could properly refer the

(1) (1882) 10 Q. B. D. 309, at pp. 320, 321.

matter with their report to the quarter sessions. But notice of objection was duly given to the applicant under s. 42 of the Licensing Act, 1872, and the justices heard evidence on oath as provided by that section. They were entitled to act on their own knowledge with respect to the licensed houses in their district: *Rex* v. *Howard* (1); and they did so act, and differentiated the house in question from the other licensed houses in the neighbourhood. This case, therefore, differs from *Raven* v. *Southampton Justices* (2), where there was no evidence before the quarter sessions to differentiate the particular house. Further, assuming the facts here would bring the case within *Raven* v. *Southampton Justices* (2), that decision does not apply. The question before the licensing justices under s. 1 of the Licensing Act, 1904, is entirely different. Where the objection is that the licensed house is not required for the needs of the neighbourhood they have no longer to decide whether or not the licence should be renewed, but only to form an opinion whether or not the question of the renewal requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them; and, if they are of opinion that the question does so require consideration, they are to refer the matter to quarter sessions together with their report thereon. They may form that opinion from their own knowledge or upon any evidence before them. There is no appeal from their decision, and when they have formed their opinion and referred the matter to quarter sessions there is nothing left for them to do. They are not bound to hear evidence with respect to the other houses in the neighbourhood. The words in s. 1, sub-s. 2, of the Act of 1904, "in accordance with the Licensing Acts, 1828 to 1902," may merely mean "at the times prescribed by those Acts"; but, if that be not so, the only effect of the words is to apply procedure so far as it is necessary to apply it having regard to the Act of 1904. The rules, therefore, should be discharged.

Low, K.C., and *Bruce Williamson*, for the prosecutor, supported the rules. The licensing justices have to determine the question before them in the same way as they had before the Act

(1) [1902] 2 K. B. 363. (2) [1904] 1 K. B. 430.

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of 1904 was passed, although that question now is whether they should refer the matter to the quarter sessions with their report instead of whether they should or should not renew the licence. The question before the quarter sessions is practically whether or not the licence should be bought out. Under the Act of 1904 licensing justices select the houses to be brought before the quarter sessions, who deal with the selected cases. The words in s. 1, sub-s. 2, "on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902," clearly shew that the licensing justices are to exercise their jurisdiction under the same conditions as they did before the Act was passed. Sect. 42 of the Licensing Act, 1872, applies to all cases "where a licensed person applies for the renewal of his licence," and, therefore, the matter which the licensing justices still have to hear and determine at the general annual licensing meeting is an application by a licensed person for the renewal of his licence; so that all the provisions of s. 42 are brought in and must be complied with. Otherwise the justices might refer the matter to quarter sessions without the licensed person being present, or, if he was given notice to attend and did attend, without any inquiry at all. The licensing justices must have evidence before them that the house, comparing it with other houses in the district, is not wanted. If they act upon their own information merely, the licensed person cannot know what is in their minds and has no opportunity of displacing it. The onus is not upon him to shew that his house is wanted, but upon the objector to shew that it is not, and when once the licensed person is brought, as he must be brought, before the justices to answer the objection, there must be evidence to support the objection. By s. 26 of the Licensing Act, 1874, a licensed person applying for the renewal of his licence shall not be required by the licensing justices to attend at the general annual licensing meeting "save for some special cause personal to himself." It is not a special cause personal to himself that there are too many licensed houses in the neighbourhood, and his house is not required. On the facts appearing in Mr. Tolhurst's affidavit there was no evidence upon which they could properly act; there was no evidence on oath to differentiate this

house from the other licensed houses in the neighbourhood; and the case, therefore, comes within the decision in *Raven* v. *Southampton Justices.* (1) It is unnecessary to discuss whether a writ of prohibition ought to go, because the question clearly can be raised on an application for a mandamus.

Cur. adv. vult.

REX *v.* COX AND OTHERS.

Rules nisi (1.) for a prohibition to the licensing justices for the Gore Division of the county of Middlesex prohibiting them from further proceeding in the matter of referring to quarter sessions the application of the prosecutor, John West, for the renewal of his licence to sell beer and cider to be consumed on or off the premises at the Pleasure Boat beerhouse at Alperton in that division, and (2.) for a mandamus commanding them to proceed to hear and determine his application according to law.

In this case the licensing justices, prior to the general annual licensing meeting, had appointed a committee of their number to view, and make a report upon, all the licensed houses in the division. The committee made their report, submitting to the licensing justices a list of fourteen houses (including the Pleasure Boat) the licences of which the committee considered it would be desirable not to renew on grounds other than those on which the renewal of an existing on licence could be refused by the licensing justices. Having previously met and considered the report of the committee, the licensing justices at the general annual licensing meeting decided that the question of renewing the licences of three of those licensed houses (including the Pleasure Boat) required consideration on grounds other than those on which the renewal of an existing on licence could be refused by them, and they accordingly in each case referred the matter to the quarter sessions with their report thereon.

No notice of objection to the renewal of his licence, or requiring him to attend, was given to the prosecutor. No

(1) [1904] 1 K. B. 430.

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objection was taken to the renewal of his licence by any person at the general annual licensing meeting, and no evidence was given in respect of the prosecutor's application for renewal.

Travers Humphreys, for the justices, shewed cause. The licensing justices, in forming an opinion under s. 1, sub-s. 2, of the Licensing Act, 1904, are entitled, if they think fit, to act upon their own knowledge only; they need not give any notice to the licence-holder, or hear any evidence on oath. When once they are of opinion, upon any materials, that the question of the renewal "requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them," they have no jurisdiction but to refer the matter to quarter sessions. Sect. 42 of the Licensing Act, 1872, though it still applies where the licensing justices have jurisdiction to refuse the renewal of a licence, does not apply where they have only to form an opinion whether or not the question of renewal requires consideration on other grounds than those on which they can refuse the renewal of an existing on licence. Mandamus will not lie if there is an appeal, as there probably is, from the licensing justices' decision to refer.

George Elliot, for the prosecutor, supported the rule. On the facts the prosecutor is clearly entitled to a writ of mandamus, because he had no notice either to attend at the general annual licensing meeting, or that the renewal of his licence was objected to by anybody. He had, therefore, no opportunity of calling evidence with respect to his own and the other licensed houses in the neighbourhood, and of pointing out facts with respect to them which might induce the licensing justices not to select his house as being one not required for the needs of the neighbourhood. It is a condition precedent to the justices' jurisdiction in this respect that the licensed person shall have the notice to attend required by s. 42 of the Licensing Act, 1872. Sect. 1, sub-s. 2, of the Licensing Act, 1904, at least requires that notice to be given.

Cur. adv. vult.

[A number of other cases, which are referred to in the judgment of the Court (post), and in which rules nisi for a prohibition and mandamus had been obtained against licensing justices, were also heard and decided by the Court. As, however, the same points arose, and the arguments were substantially the same, as in *Rex* v. *Tolhurst and Others* and *Rex* v. *Cox and Others*, it is thought sufficient to report those two cases only.]

May 22. The following judgment of the Court (Lord Alverstone C.J., Kennedy and Ridley JJ.) was read by

LORD ALVERSTONE C.J. In these cases rules nisi have been granted calling upon the licensing justices in a number of instances to shew cause why writs of prohibition should not issue to prevent them from taking any further proceedings in the matter of certain reports which they proposed to make to quarter sessions in respect of applications for the renewal of certain licences. Rules nisi for mandamus were granted at the same time calling upon the same justices to hear and determine the applications for renewal. We think it doubtful whether prohibition is the right remedy. As, however, the same point is raised upon the applications for writs of mandamus, it is unnecessary to decide this point on the present occasion, and in the event of it being necessary to decide it on any future occasion it must be taken that we have expressed no opinion upon it now.

The point raised on behalf of those for whom the rules were moved is that the justices had not before them any evidence sufficient to justify them in making reports to the quarter sessions in respect of the licensed houses in which the applicants for the rules were interested. This was the ground of the applications in some of the cases before us. In the remaining cases a further point was raised—namely, that no notices pursuant to s. 42 of the Act of 1872, as amended by the Act of 1874, had been given to the applicants for renewal to attend before the licensing justices. The questions really depend upon the construction which should be placed on sub-s. 2 of s. 1 of the Licensing Act, 1904; but in order to appreciate the

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point it will be convenient to consider the statutory enactments prior to that date. By s. 42 of the Act of 1872, as amended by the Act of 1874, it was provided that where a licensed person applies for a renewal of his licence he need not attend in person unless he is required by the licensing justices so to do for some special cause personal to himself; that the justices shall not entertain any objection to the renewal of such licence, or take any evidence in respect of the renewal thereof, unless written notice of an intention to oppose the renewal of such licence, stating in general terms the grounds of opposition, has been served on such holder not less than seven days before the commencement of the general annual licensing meeting, with the proviso that the licensing justices may, notwithstanding that no notice has been given, upon an objection being made adjourn the granting of a licence to a future day, and require the attendance of the holder of the licence when the case is to be heard and the objection considered. Sub-s. 3 provides that the justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. The decisions in *Sharpe* v. *Wakefield* (1) and *Rex* v. *Howard* (2) establish that a notice under the proviso to sub-s. 2 of s. 42 may be given by the direction of the justices themselves, and, further, that the question whether the licence should be renewed, having regard to the wants and requirements of the neighbourhood and the number of licensed houses therein, is one of the grounds which the justices were entitled to consider upon the question of renewing any particular licence. This, so far as it is necessary to refer to it for the purpose of the case before us, was the position of matters at the time of the passing of the Act of 1904. That Act, by sub-s. 1 of s. 1, confined the power of the licensing justices to refuse renewal to certain specified grounds, which do not include the question of the necessity for the houses having regard to the requirements of the district; and sub-s. 2 provided that where the justices of a licensing district, on the consideration by them in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of

(1) [1891] A. C. 173. (2) [1902] 2 K. B. 363.

opinion that the question of the renewal of any particular existing on licence requires consideration on grounds other than those "on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions together with their report thereon." It is upon these words that the question arises. It is contended by counsel on behalf of the justices shewing cause against the rules that the justices may act on their own motion and rely solely on their own knowledge; that it is no longer necessary for them to require the attendance of any licence-holder in respect of whose house they propose to report, or to direct any notice, under sub-s. 2 of s. 42 of the Act of 1872, to be given to the holders of such houses, and that the justices need not take evidence on oath where the renewal of any existing on licence requires consideration on grounds other than those on which the renewal can be refused by them. We summarize these contentions, not that they all arise in every case, but that they were urged in one or other of the cases as being the true position of the licensing justices under this section. On the other hand, it was contended in support of the rules that the justices must pursue the course which they would have followed under s. 42 of the Act of 1872, as amended by s. 26 of the Act of 1874, and give notice to all the applicants who are holders of the licences of the houses upon which they propose to report, and hear all the evidence as though they were themselves deciding under the old law the question whether the licence should be renewed.

It will be convenient to deal first with the cases in which no notice had been given to the licensed holders. We are clearly of opinion that the justices ought not to make a report respecting any house without giving notice to the licensed holder and giving him an opportunity of attending and, if he desires, of tendering evidence. This seems to us to be clear, not only on principle, but from a consideration of the previous legislation. The report may certainly affect and alter the position of the licensed holder and in many cases his property. The objection that the house is not required may be raised by

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an opponent, independently of the justices themselves. In that case the Act of 1872 clearly provides that notice must be given to the licensed holder. Sub-s. 2 of s. 1 of the Act of 1904 directs the justices to report whether on the consideration by them in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, they are of opinion that the question requires consideration. It seems to us that, inasmuch as the question relating to a particular house can be raised by an opponent, and that the occasion referred to would, but for the Act of 1904, only arise where notice had been given, the language of sub-s. 2 is not sufficient to alter the existing law, which the new legislation nowhere repeals, which law requires that notice should be given. Further, the knowledge that the particular house is not required for the needs of the district may be brought to the notice of the justices for the first time by the evidence given on behalf of an objecting opponent. The justices would certainly have to hear any evidence tendered by a person objecting; it seems plain on general principles that the person who, or whose property, is affected by such evidence must have the opportunity of tendering evidence in favour of renewing the licence, instead of referring the matter to quarter sessions. We do not see how the justices could properly consider the question of whether the renewal of any particular licence requires consideration on other grounds without at least giving the opportunity to the licensee of putting before them any evidence which he considers bears upon that question. In the cases, therefore, in which no notice was given to the licensed holders, we are clearly of opinion that the proceedings were not regular, and that the rule for mandamus should be made absolute.

In the other cases notice was given to the licensed holders pursuant to sub-s. 2 of s. 42, and the question in these cases is whether evidence must be taken before the licensing justices can make a report, and whether there was sufficient evidence in any of these cases to justify the justices in making such a report. In our opinion the true position of the justices differs somewhat from that which was urged before us on either side.

It must be remembered that the condition precedent to their making a report is that they shall be of opinion that the renewal of an existing licence requires consideration on grounds other than those on which the licence can be refused by them. This is obviously a somewhat different question from that which the quarter sessions have to consider—namely, whether a particular house shall be selected as the house, or one of a number, in respect of which the renewal of the licence requires consideration; but we see nothing to alter the existing law that the justices' opinion upon this question is to be based upon evidence, and that such evidence must be taken upon oath, and liberty given to the applicant, the holder of the licence, to cross-examine the deponent, and to call evidence in favour of his application. The amount of evidence, however, which may be sufficient for the purpose of enabling the justices to form the opinion indicated in the section may, in our judgment, be properly treated as different from the amount which could be regarded as sufficient if they had to decide judicially whether or not the particular licence should be renewed or refused. It will not, we think, be necessary in all cases for them to have detailed evidence with regard to the differentiation between public-house and public-house, as the majority of the Court thought was necessary in *Raven* v. *Southampton Justices.* (1) There the quarter sessions had to consider the same question as will arise before the committee of quarter sessions under the Act of 1904, namely, whether they will decline to renew the licence of each particular house in respect of which a report is made. Evidence of the character of the district, the locality of the public-house and of the other public-houses, and the number of public-houses in the district might be quite sufficient to justify the justices in making a report to quarter sessions that the question of the renewal of any particular licences requires consideration on grounds other than those on which the licensing justices can act. It was suggested in argument in opposition to the rules that in making a report the justices might act on their own knowledge and information only and

(1) [1904] 1 K. B. 430.

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without any evidence given before them. In our opinion, it was not intended that in forming an opinion as to whether they shall make a report they should exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, and the habits of the inhabitants. It seems to us, for the reasons expressed by Collins M.R. in *Rex* v. *Howard* (1), that it cannot have been the intention of the Legislature that the justices should divest themselves of such knowledge, or determine the question solely on materials provided by the individual who happens to object. But this seems to us to be an entirely different matter from that which we have to consider, and, in our opinion, is consistent with the view that notice must be given to the licensed persons whose licences will be affected, and in so far as the opinion of the justices is formed upon facts with regard to a particular house, those facts should be proved before them by evidence upon oath, so as to give the licensed person an opportunity of testing them and of himself giving evidence if he so desires to do. It only remains to be considered whether, in the cases with which we are now dealing, there was sufficient evidence before the justices to enable them to make a report. In each case they had evidence as to the number of public-houses, the amount of population, and the character of the neighbourhood: in each case the applicants for the licences were present and had the opportunity of cross-examining and calling further evidence; and, in our opinion, therefore, the justices in these cases acted in accordance with the view of the law which we have already expressed, and it was not necessary for them, before reporting, to go further and inquire into the matters which it may be necessary for quarter sessions to consider when they approach the question as to whether the licences of any particular houses should not be renewed. In those cases, therefore, namely, *Rex* v. *Tolhurst and Others* and [His Lordship mentioned the other cases raising the same point as in *Rex* v. *Tolhurst and Others*] the rules must be discharged. In *Rex* v. *Cox and Others* and

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[His Lordship mentioned the other cases] the rules must be made absolute. The rule nisi for a writ of prohibition will be discharged in all the cases.

Rules discharged in Rex v. *Tolhurst and Others.*
Rules made absolute in Rex v. *Cox and Others.*

Solicitors for prosecutor in *Rex* v. *Tolhurst and Others*: *Knapp-Fisher & Sons.*

Solicitors for licensing justices: *Church, Adams & Prior, for C. G. Liddle, Anerley.*

Solicitors for prosecutor in *Rex* v. *Cox and Others*: *Harry Wilson & Co.*

Solicitors for licensing justices: *Sharpe, Parker, Pritchards, Barham & Lawford.*

W. A.

[IN THE COURT OF APPEAL.]

C. A. 1905 *June* 9.

THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED, AND OTHERS *v.* THE ILFORD GAS COMPANY.

Mortgage—Land—Right of Entry of Mortgagee—Entry—Relation back of Right of Possession—Trespass antecedent to Entry—Right of Action.

After entry by a mortgagee of land his right of possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrong-doer for a trespass committed at a time antecedent to the entry.

Barnett v. *Guildford* (*Earl*), (1855) 11 Ex. 19, approved and applied.

APPEAL from an order made by Darling J. at the trial of the action.

The plaintiffs were the Ocean Accident and Guarantee Corporation (hereinafter called the Ocean Corporation) and two persons named Neill and Mellor. The action was brought to recover damages for trespass, and nuisance causing injury to land and houses. The injury was caused by a flood which took place in June, 1903, and the allegation was that the damage sustained by the plaintiffs was due to the fact that the defendants

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wrongfully stopped up a natural stream or watercourse upon their land. At the trial the jury disagreed on the question of the liability of the defendants and no verdict was given. The learned judge upon the application of the defendants gave judgment in favour of the defendants against the Ocean Corporation, leaving the other plaintiffs to pursue their remedy, if any, on a retrial of the action.

It appeared that in August, 1902, the then owner of certain houses at Ilford mortgaged them by an assignment to Neill and Mellor as security for an advance made by them, the mortgage deed containing a covenant for repayment in the following December of the money advanced. Concurrently with this deed the owner mortgaged the premises, subject to the first-mentioned mortgage, to the Ocean Corporation, by way of assignment and as security for a sum of 3000*l.* advanced by the Ocean Corporation. In this deed it was provided that the Ocean Corporation might at any time thereafter enter into possession of the premises, and into the receipt of the rents and profits thereof, for such time as they should think fit, and might appoint collectors to be paid out of the rents, and might demise, either weekly, quarterly, or from year to year, or for any period not exceeding twenty years, all or any of the premises. By arrangement between the Ocean Corporation and Neill and Mellor the former guaranteed the repayment to the latter of the principal and interest due upon their mortgage. At the time of the flood the mortgagor was in possession, some of the houses were vacant, but the greater number were let to tenants principally upon weekly tenancies. After the occurrence of the flood, which damaged some of the houses, the Ocean Corporation, as the persons really interested in the property, considering that steps should be taken to repair the houses, entered into possession in September, 1903. They subsequently instituted proceedings against the mortgagor for foreclosure, and in October, 1904, a decree absolute for foreclosure was made. The question of damages was not gone into at the trial, that of the liability of the defendants being the only question brought before the jury. Upon the failure to obtain a verdict on this matter the learned judge took into consideration the position of

the Ocean Corporation, and came to the conclusion that, as they were second mortgagees and were not in possession at the date of the trespass, and were claiming only as owners and not for any injury to their interest as mortgagees, they were not entitled to sue. He refused to give leave to amend, and gave judgment for the defendants with costs as against the Ocean Corporation.

The Ocean Corporation appealed, the principal questions on the appeal being whether, as equitable mortgagees not in possession at the time of the trespass, they could maintain an action in respect of it; and whether, so far as related to such of the property as was in the hands of the mortgagor at the time of the trespass, their subsequent entry related back to the time of their legal right to enter so as to give them a right of action. Other questions were discussed on the argument of the appeal, but no judgment was given upon them, and they are not included in this report.

June 7. *Shearman*, *K.C.*, and *Leck*, for the Ocean Corporation, in support of the appeal. The Ocean Corporation were owners in possession at the date of the writ, but their right to take possession was in existence at the time of the trespass, and their title as mortgagees in possession relates back to a time antecedent to the trespass. A mortgagee's title does not relate back so as to make that a trespass which would not otherwise have been one; but it only can relate back where, as in this case, there has been an actionable wrong. In *Litchfield* v. *Ready* (1) Parke B. limited the application of the rule as to relation back to the case of disseisor and disseisee; but in the later case of *Barnett* v. *Guildford* (*Earl*) (2) he treated the rule as of much more general application, and described its effect in terms that cover this case. The question is not one of legal estate but of a legal right of entry—that is a right of entry that can be enforced in a Court of law. The right of entry in the Ocean Corporation was created by the mortgagor's assignment to them, and the first mortgagees by their agreement as to indemnity cannot intervene; but if they could they have not

(1) (1850) 5 Ex. 939. (2) (1855) 11 Ex. 19.

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done so. They are also parties to the action, and the claims of the two sets of plaintiffs cover all the damage for which the defendants could be liable, and there can be no objection to their being joined in one action.

[They cited also *Anderson* v. *Radcliffe*. (1)]

Duke, K.C., and *Sylvain Mayer*, for the defendants. The order of the learned judge was equivalent to a nonsuit, and when the facts are considered it was rightly made. The Ocean Corporation claimed as owners in occupation who had let to weekly tenants. At the time of the alleged trespass they were not owners and were not in possession. They were equitable mortgagees not in possession, and could not sue in trespass, and when they took possession their title did not relate back: *Wheeler* v. *Montefiore* (2); *Turner* v. *Cameron's Coalbrook Steam Coal Co.* (3); *Litchfield* v. *Ready* (4); *Cook* v. *Harris*. (5) The doctrine of relation back is only applicable where the legal title at the time of the trespass was in the person who subsequently took possession, and is not applicable where only an equitable title existed, such as that of the Ocean Corporation at the time of the alleged trespass. When they entered they did so as mere tenants at will to the first mortgagees, and had no title which could be perfected by entry as against antecedent wrong-doers.

Shearman, K.C., in reply.

Cur. adv. vult.

June 9. COLLINS M.R. This is an appeal from an order made by the learned judge who tried the action, which arose in this way. It is claimed on behalf of the plaintiffs that the defendants are responsible for a sudden incursion of water into premises, consisting chiefly of houses in the occupation of weekly tenants. The persons who claim in this action a remedy for the damage so caused are the mortgages of the premises, namely, the Ocean Corporation who are second mortgagees, and two persons who are first mortgagees. The

(1) (1860) E. B. & E. 806, 819; 29 L. J. (Q.B.) 128.
(2) (1841) 2 Q. B. 133; 57 R. R. 614.
(3) (1850) 5 Ex. 932.
(4) 5 Ex. 939.
(5) (1698) 1 Ld. Raym. 367.

mortgagor does not enter into the discussion, for the second mortgagees, under the terms of their assignment, were entitled to enter at any time, and therefore were so entitled when the particular mischief which caused the damage to the premises arose, and they subsequently entered on the premises.

At the trial the question of the liability of the defendants was the only matter before the jury, for some damage was admitted, but the consideration of the amount of damage was left over for subsequent discussion. Upon the point before them the jury disagreed, with the result that no verdict was given. At that stage a question was raised as to the rights of the parties rebus sic stantibus, and the point was put to the learned judge by counsel for the defendants that, having regard to the nature of the property damaged and the position of the parties, the second mortgagees had not shewn that any right of action was vested in them. No discussion took place and no point was taken as to the different rights of the parties claiming being dependent upon the question whether the claims were in respect of damage to a possessory right or for injury to a reversion. It was left open to the Ocean Corporation to prove damage to the possession, and the point taken was, not their right to recover if such damage could be proved, but that although they were averred to be in possession they had not proved any right to recover in the action. The learned judge took this view, and dismissed them from the action.

It is claimed on behalf of the second mortgagees that they have a right as against the mortgagor to stand in his shoes, and that, although he has parted with the legal estate, he might, had he been in possession, have sued in respect of the injury on which the claim in this action is founded, and that consequently the second mortgagees may maintain the action. The argument in support of this view is that, at the time when the wrong was done by the defendants, the second mortgagees were entitled to enter, and that before these proceedings were commenced they entered and took possession. They pray in aid the well-known proposition of law that in an action of trespass the right to sue, as against the wrong-doer, relates back after entry to the time at which the right to enter

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accrued, so as to give a right of action for trespass intermediate in point of time between the date of the right to enter and that of the actual entry. They therefore claim a right to put in suit the damages occasioned by the trespass of the defendants, which occurred after the right to enter arose and before action. The question was raised whether the right of relation back applies only when the person claiming it has the legal estate. At one time there was ground for considering that to be the correct view. In *Lichfield* v. *Ready* (1) Parke B. seems to have considered that the doctrine of relation back applied only to the case of disseisor and disseisee, but if so he afterwards altered his view, and the matter was finally set at rest by the judgment of the Court of Exchequer, delivered by the same learned judge, in *Barnett* v. *Guildfold* (*Earl*). (2) The point was there taken that the earlier decision limited the right of relation back to the particular case then being considered; but Parke B. came to the conclusion that this view was too limited, and that there was a broad principle underlying the matter, which he applied to a case that would have been excluded under his previous decision. That principle appears to me to be wide enough to cover the position that I have described, and to govern this case. At p. 32 of the report I find in the judgment of the learned judge this passage: "But the strongest argument urged in favour of the doctrine by relation in actions of trespass to land arises from the practice in actions for mesne profits, which forcibly struck the mind of Mr. Justice Coltman, as is stated in the report of the case of *Tharpe* v. *Stallwood*. (3) It appears to be the established practice in these actions, where the plaintiff seeks to recover profits anterior to the day of the demise from the tenant in possession, or at any date from an occupier not the tenant in possession, that the plaintiff may recover them if he proves his title to the possession at the time the profits were so taken, and also the execution of the writ of possession or actual possession taken; for taking actual possession has the same effect as the execution of an habere facias posses-

(1) 5 Ex. 939.
(2) 11 Ex. 19.
(3) (1843) 5 Man. & G. 760; 63 R. R. 474.

sionem, as explained in a note of my brother Manning in *Butcher* v. *Butcher* (1); 2 Starkie on Evidence, 453, 3rd ed.; Adams on Ejectment, 342, 2nd ed.; Roscoe on Evidence, 579. If this be so, upon what principle can it be, as Mr. Justice Coltman observes in the place cited, except that the person so entering and taking possession was entitled thereby to those profits at the time they arose, and that can only be by relation back of the entry to the actual title as against the wrong-doer. To these profits the doctrine of estoppel by the record in ejectment cannot possibly apply; and, therefore, it is not by means of the fiction of an ejectment, but by virtue of the relation back at common law, that they are recoverable. We think, therefore, upon full consideration of this important question, that the argument that there is a relation back from the time of actual entry to the time of the legal right to enter must prevail,—a relation created by law for the purpose of preventing wrong from being dispunishable, upon the same principle on which the law has given it in other cases." It is not too much to say that the class of cases to which reference is there made includes ordinary actions of ejectment, and for mesne profits, brought by a person who has not the legal estate, but is entitled to put his right of possession in suit, because the wrong-doer cannot dispute that right. That is the position of the second mortgagees in this case. They have a right to stand in the shoes of the mortgagor, and the wrong-doer cannot dispute their title. A number of the houses were vacant, and the second mortgagees, upon their entry, were in possession of them, and were the proper persons to put in suit a claim against a wrong-doer for trespass to those houses. That consideration is sufficient to cover this case. The plaintiffs are—the persons in possession, and others having a reversionary claim,—and it is clear that, whatever may have been the case before the Judicature Act, they can now be joined as plaintiffs, so that the damages for the whole wrong for which the defendants are said to be liable can be determined in the action. It is clear to my mind that the Ocean Corporation were proper parties to the action. A difficult question has been raised, and

(1) (1827) 1 M. & R. 220; 7 B. & C. 399; 31 R. R. 237.

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an intricate discussion has taken place, as to the rights of an equitable mortgagee in respect of damage to the inheritance. Upon the view that I have indicated it is not necessary to consider this matter; the only question that we have to decide arises upon the order made by the learned judge, and for the reasons that I have given I think the order cannot be supported, and this appeal must be allowed.

COZENS-HARDY L.J. I am of the same opinion. Several difficult questions have been raised and argued, on most of which it is not necessary to give an opinion. The point dealt with by the Master of the Rolls is sufficient to decide this appeal. It appears that the mortgagor was in actual possession of some, and in receipt of the rents and profits of the rest of the houses, at the date of the flood which caused the damage complained of. He had a right of action, and the second mortgagees having entered are entitled to say that their title relates back to a time antecedent to the flood, and that they are entitled to sue for the damage caused by it. The passage quoted by the Master of the Rolls from the judgment of Parke B. in *Barnett* v. *Guildford* (*Earl*) (1) and the decision of the Exchequer Chamber in *Anderson* v. *Radcliffe* (2), where the plaintiff's title to possession was held to relate back so as to override a seizure by a sheriff, are direct authorities on the point before us. I give no opinion whether there was a right of action in the Ocean Corporation in respect of houses which were in the occupation of tenants. I think that the order of the learned judge cannot be supported, and that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Mellor, Smith-Winby & Jones.*
Solicitor for defendants: *J. S. Tyler.*

(1) 11 Ex. 19. (2) E. B. & E. 806, 819; 29 L. J. (Q.B.) 128.

A. M.

LOWE *v.* DORLING & SON.

1905
June 20.

Landlord and Tenant—Distraint on Goods of Lodger—Illegal Distress—Liability of Bailiff to Action—Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict.* c. 79), s. 2.

An action will lie against a bailiff for an illegal distress under s. 2 of the Lodgers' Goods Protection Act, 1871.

Page v. *Vallis*, (1903) 19 Times L. R. 393, overruled.

APPEAL from the Bow County Court.

The action was brought to recover damages for an illegal distress.

The plaintiff was a lodger on premises of which the rent to the superior landlord had become in arrear. On June 22, 1904, the defendants, acting as bailiffs for the superior landlord, levied a distress on the premises and seized (inter alia) a piano belonging to the plaintiff.

The plaintiff on July 8 served the bailiff with a declaration under s. 1 of the Lodgers' Goods Protection Act, 1871, setting forth that the piano was his property; but in spite of this the defendants on August 12 sold the piano.

At the trial at the county court it was contended that no action lay against the bailiff under s. 2 of the Lodgers' Goods Protection Act, 1871; but the county court judge held that, as the section declared that under such circumstances the bailiff was to be deemed guilty of an illegal distress, an action would lie.

The defendants appealed.

Ronald Walker (*C. E. Jones* with him), for the appellants. No action will lie against a bailiff under s. 2 of the Lodgers' Goods Protection Act, 1871. (1) That has been held to be so

(1) By the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), s. 2, "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such

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by Darling J. in *Page* v. *Vallis*. (1) The only remedy is that given by the last part of the section, namely, by action against the superior landlord. The first part of the section only describes the state of affairs in which the lodger may make application to the justice of the peace for the return of the goods, and provides that he is to make such order for the recovery of the goods "or otherwise" as he may think fit. That, therefore, is the lodger's only remedy against the bailiff. Apart from the statute the lodger would have no right of action against any one if his goods were distrained by a superior landlord, and if the Legislature had intended to give him a right of action against the bailiff who had made the distress they would have said so in plain language. [He referred to *Barraclough* v. *Brown*. (2)]

Schwabe, for the respondent. The earlier part of the section applies where a landlord, without employing a bailiff, has himself made the distraint. Such a landlord, like the bailiff or the other person employed by him, is to be deemed guilty of an illegal distress, and if so an action for illegal distress will lie. The last part of the section covers the case of a superior landlord who has employed a bailiff, but has not authorized him to proceed with the sale of the lodger's goods. To hold that the only remedy given by the section was the right of action against the superior landlord would be to render nugatory the words in the earlier part of the section—"shall be deemed guilty of an illegal distress."

Ronald Walker replied.

LORD ALVERSTONE C.J. Nobody can deny that the question raised by this appeal is capable of considerable discussion,

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superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

(1) 19 Times L. R. 393.

(2) [1897] A. C. 615.

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especially as my brother Darling took a contrary view to that which we entertain; but, having had the matter fully argued, and having been able to consider the question more carefully than is possible at Nisi Prius, I have come to the conclusion that the county court judge was right in holding that in such a case an action will lie against the bailiff.

The county court judge says in his judgment: "I hold that as s. 2 declares the distress to be illegal, and an action for an illegal act carries with it when duly proved a right to damages, an action can be brought against a bailiff for such damages unless the statute says it must not."

It is argued that the effect of s. 2 is to limit the right of action for an illegal distress to the remedy against the superior landlord. I cannot think that this is so. I think we must look at the whole statute broadly. The preamble says: "Whereas lodgers are subjected to great loss and injustice by the exercise of the power possessed by the superior landlord to levy a distress on their furniture, goods, and chattels for arrears of rent due to such superior landlord by his immediate lessee or tenant." Preambles are not common nowadays, and this must therefore be taken to shew the object of the legislation. Then the Act, after safeguarding the interest of the superior landlord in s. 1 by providing for the payment to him by the lodger of any rent due to his immediate landlord, and by providing for a correct inventory of the lodger's goods, goes on in s. 2 to say: "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress." I do not think that it can be seriously contended that if the section had stopped there no action would lie against the bailiff who had levied the distress. I confess that at first I did not quite see why the superior landlord was included in that part of the section, considering

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the language of the latter part of the section; but as it has been pointed out, it is possible for a landlord to distrain himself and not to employ a bailiff, and that seems to be the reason of the insertion of the name of the superior landlord in this part of the section. An illegal distress is an expression well known to the law, and primâ facie a bailiff is responsible if he enters a house and seizes another man's goods, and the landlord who employed him would only be responsible if he authorized the bailiff to do so. Sect. 2 proceeds: "and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods." I cannot think that the words which I have read before were merely intended as a preamble to enable the lodger to make an application to the magistrate for the restoration to him of his goods. He goes to the magistrate because he has served a declaration and inventory of his goods, and this part of the section is not in my opinion merely a description of the state of things in which he can apply to the magistrate for an order. The section goes on to say: "such magistrate . . . . shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him . . . . may seem just." In my opinion the words "or otherwise" cannot possibly be held to give the magistrate power to make any one pay damages for the illegal distress. Then come the last words of the section: "and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into." It is contended that those words are inserted to give a remedy merely against the landlord, in which the landlord can question the truth of the lodger's declaration and inventory, and that they by implication negative any right of action against the bailiff or any other person except the landlord. But I think those words were inserted to make the superior landlord liable even where he had not authorized the bailiff to seize the goods of the lodger. In my opinion that was the reason for the insertion of those words, and they must not be construed as cutting down the remedy given by the earlier part of the section against the bailiff.

KENNEDY J. I am of the same opinion. I confess that during the argument I felt some doubt as to the proper construction of the section, and I need not say that that doubt was much enhanced by the view taken of it by Darling J. It seems to me, however, that it would require stronger language than can be found here to make us hold that a bailiff who by the language of the section is to be deemed to have been guilty of an illegal distress should not be liable for that tortious act to the person whom he has injured. I agree that the words at the end of the section are rather difficult to construe, but I think the better view of them is that which has been expressed by my Lord—namely, that if the section had stopped earlier it might have been said that, if the notice had been served only on the person actually making the distress, the superior landlord would not become liable to an action, and that this was a statutory provision in favour of the lodger which did not make a superior landlord legally responsible if all that he had done was to authorize the bailiff or other person to make a distress which only became illegal after the service upon the bailiff or other person of the declaration and inventory. I think that to prevent any argument of that sort these words were added, in order to make it clear that the superior landlord is liable whether he has expressly and after notice authorized the acts constituting the illegal distress or not. There is perhaps some support for this view in the final words of the section.

RIDLEY J. I agree, and I only add a word because of the decision of my brother Darling from which we are dissenting. In my opinion, s. 2 of the Lodgers' Goods Protection Act, 1871, deals with three sets of persons—the superior landlord, the bailiff, and the other person employed by him. Any one of those may make the distress, and if any one of the three does so after being served with the declaration and inventory he is to be deemed guilty of an illegal distress. So far the section only deals with the person actually making the distress. Any person who makes an illegal distress is liable to an action in respect of it by the general law, because he has

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committed a tortious act. The superior landlord, however, who had instructed a bailiff or other person to distrain, would not be liable unless he had expressly authorized the acts constituting the illegal distress. The words at the end of the section, therefore, are meant, in my opinion, to make him liable whether he has authorized those acts or not. It is said that they shew that the only remedy is by action against the superior landlord, and that they take away any right of action against the bailiff. If so, we can give no effect to the words in the earlier part of the section as to being deemed guilty of an illegal distress. It seems to me that the only way of giving effect to the whole of the section is to hold that the words do not cut down the remedy against the bailiff, but give a remedy against a landlord who has not authorized what by the earlier words of the section is to be deemed an illegal distress.

Appeal dismissed. Leave to appeal granted.

Solicitor for appellant: *C. C. Sharman.*
Solicitor for respondent: *H. E. Tudor.*

A. P. P. K.

CHADWICK *v.* PEARL LIFE INSURANCE COMPANY.

1905
April 12, 14.

Revenue—Income Tax—Annuity or Annual Payment—Deduction of Income Tax—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35), *s.* 102; 1853 (16 & 17 *Vict. c.* 34), *s.* 40—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The plaintiff, the owner of a leasehold interest expiring in 1912 in certain property which was sublet at a gross rental of 1925*l.* but subject to the payment of a ground-rent of 300*l.* to the superior landlord, contracted with the defendants for the sale to them of his interest, the transaction being carried out by two deeds of even date. By the first deed the plaintiff conveyed and assigned the property to the defendants for the residue of the term, subject to the payment of the 300*l.* ground-rent to the superior landlord (which the defendants covenanted to pay), the consideration for the assignment being expressed to be the payment by the defendants of the sum of 1000*l.* to the plaintiff and the execution by the defendants of a deed of even date. By the latter deed the defendants covenanted with the plaintiff to pay him until the last day of the term the sum of 1625*l.* per annum by quarterly payments; no sum was fixed as the total amount to be paid. In making the quarterly payments the defendants, acting under s. 40 of the Income Tax Act, 1853, and s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, deducted income tax at the current rate, and the plaintiff sought to recover the amounts so deducted:—

Held, that the intention of the transaction was that the plaintiff should continue to receive as income to the end of the term the same net amount that he had previously received as rent; that the payments were payments of an annuity or other annual payment within the meaning of s. 40 of the Income Tax Act, 1853, and were not the payment of a fixed amount by instalments, and that the deductions in respect of income tax had therefore been properly made by the defendants.

ACTION tried before Walton J. without a jury.

The following statement of facts is taken from the judgment. In this case the plaintiff claims a sum of 50*l.* 5*s.* 9*d.* as the balance of money due to him from the defendants in pursuance of a deed of covenant dated February 6, 1904, and the particulars shew that the claim is in respect of certain annual payments payable to the plaintiff under that deed. The total amount of the payments so payable was 1038*l.* 4*s.*, of which the defendants have paid 987*l.* 18*s.* 3*d.*, leaving 50*l.* 5*s.* 9*d.*, the balance claimed. That balance represents deductions in

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respect of income tax from the periodical payments which the defendants were liable to make under the deed, and the question in the case is whether the defendants were entitled to make those deductions or not.

The facts, so far as they are material, appear from two deeds, both dated February 6, 1904. The plaintiff and a number of other persons were entitled to a leasehold interest in certain property in the City of London, expiring on December 25, 1912. The first of the two deeds is a deed of assignment made between the plaintiff and numerous other persons, as owners of the term, of the one part, and the defendants of the other part. After several recitals explaining the exact position of the property and the various interests in it which had already been created, comes this recital: "And whereas the said Alfred Chadwick and" (the other persons interested in the property) "have respectively contracted with the purchasers" (that is, the defendants) "for the sale to them of the said hereditaments and premises hereby assured for the sum of 1000*l.* and in consideration of a deed of covenant bearing even date herewith and made between the same parties Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of 1000*l.* now paid by the purchasers as follows" (that is, paid in certain proportions to the different persons who were interested in the property) "the said Alfred Chadwick"—(and the others)—"convey and assign unto the purchasers their successors and assigns All that piece or parcel of ground and wharf with the messuage or tenement and buildings thereupon erected and all other the premises comprised in and demised by the hereinbefore recited indenture of lease of the 6th day of October, 1835, to have and to hold the said undivided parts or shares and all other the premises hereinbefore expressed to be hereby conveyed and assigned unto the purchasers their successors and assigns for all the residue of the said term of eighty years subject to the payment of the said rent of 300*l.*"—the ground-rent payable in respect of this property to the head landlord—"and to the performance and observance of the covenants and conditions in the hereinbefore recited indenture of lease

reserved and contained and on the part of the lessee his executors administrators and assigns to be paid performed and observed and subject to the hereinbefore recited indentures of underlease of the 13th day of November, 1854, and the 26th day of November, 1877, but with the benefit of the rents thereby respectively reserved and the covenants and conditions therein respectively contained." Those were subleases which the lessors had made of the premises in question, one being a sub-lease for the unexpired residue of the original term, ending on December 25, 1912, less twenty-one days, and the other a sub-lease for the same unexpired residue of another part of the premises, less three days. The deed goes on: "And the purchasers hereby covenant for themselves and their assigns with the said Alfred Chadwick that they the purchasers their successors and assigns will henceforth during the said term pay the said rent of 300*l.* reserved by the before-recited indenture of lease of the 6th day of October, 1835, and observe and perform the covenants and conditions therein contained and on the lessees' part to be observed and performed, and will keep indemnified the said Alfred Chadwick and the representatives estates and effects of the said William Chadwick deceased . . . . from and against all actions proceedings claims and demands on account thereof."

That is substantially the deed of assignment. Upon the face of the deed it appears that under the sub-leases the gross rent payable was 1925*l.*; deducting from that the ground-rent of 300*l.* which was payable to the head landlord, there is left 1625*l.* as the net rent which the vendors, the assignors under the deed, were at the time of the assignment receiving from the property.

The second deed is the deed of covenant upon which the action is brought, and is between the same parties. After certain recitals it proceeds thus: "Now this indenture witnesseth that in consideration of the premises the purchasers do hereby covenant with the parties hereto"—that is, the vendors of the term—"that they the purchasers will until and including the 25th day of December, 1912"—the last day of the term—"pay the sum of 1625*l.* per annum by equal quarterly

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payments of 406*l.* 5*s.* on the 25th day of December, the 25th day of March, the 24th day of June, and the 29th day of September, the first quarterly payment to be made on the 25th day of December, 1903"; the deed then goes on to say to whom and in what shares the annual payment of 1625*l.* is to be made. Under the deed of covenant the annual payments became payable to the vendors and, among others, to the plaintiff.

Montague Lush, K.C., and *Tyrrell T. Paine*, for the plaintiff. The income tax in question was improperly deducted by the defendants from their quarterly payments to the plaintiff, who is entitled to recover it as a deduction illegally made. The nature of the transactions appears from the documents. There was an absolute sale to the defendants of the vendors' interest in the lease, which was to be paid for by a lump sum of 1000*l.* and by payment of a yearly sum of 1625*l.* until the lease should expire by effluxion of time. The Income Tax Acts do not tax capital, but only income, and the 1000*l.* was admittedly capital; it is submitted that the yearly payments of 1625*l.*, being part of the purchase price of the plaintiff's interest, were in the nature of capital also. The yearly sums of 1625*l.* were really payments by instalments of the capital accruing to the plaintiff from the sale of his interest in the lease, and such payments are not liable to deduction in respect of income tax. It is true in a sense that the deeds make mention of no fixed sum as the purchase price of the plaintiff's interest, and it may be urged that for this reason the payments cannot be treated as instalments of a debt, but the amount of the purchase price can be arrived at by a simple calculation: it must equal the yearly sum of 1625*l.* multiplied by the number of years that the lease has to run. Such payments cannot properly be treated as payments of an annuity, or as payments in the nature of income, because a personal debt was created between the parties by the assignment, and the payments made must be treated as instalments of that existing debt. The case is substantially indistinguishable from *Foley* v. *Fletcher* (1), where

(1) (1858) 3 H. & N. 769.

a mine was sold for a certain sum, part of which was paid at once, and part was to be paid by instalments spread over thirty years, and it was held that the instalments were the payment of a debt, and were not chargeable with income tax. The only apparent distinction that can be drawn between that case and the present one is that in *Foley* v. *Fletcher* (1) the total amount of the purchase-money was inserted in the conveyance, whereas here it is not so stated, but, as before pointed out, the figure can be ascertained by the simplest possible calculation. The recent case of *Secretary of State in Council of India* v. *Scoble* (2) is strongly in the plaintiff's favour, as it shews that half-yearly payments, although styled "annuities" in the contract under which they come into existence, may nevertheless, except in so far as they consist of interest upon the unpaid balance of purchase-money, be treated as payments of instalments of capital. The deductions made by the defendants were, therefore, not authorized by s. 40 of the Income Tax Act, 1853.

[They also cited *London County Council* v. *Attorney-General.* (3)]

Danckwerts, K.C., and *Grimwood Mears*, for the defendants. The deductions were rightly made by the defendants under s. 40 of the Income Tax Act, 1853. The instalments were payments of "an annuity or other annual payment" within the meaning of that section. No gross sum was ascertained as the total amount which would have to be paid by the defendants to the plaintiff, which distinguishes the case from *Secretary of State in Council of India* v. *Scoble.* (2) In the latter case it is clear that a gross sum was ascertained, for the judgments proceed upon the basis that the instalments were repayments of an antecedent debt. No doubt a proportion of each instalment in that case was in respect of interest on the balance of the debt, and on that proportion only of each instalment income tax was payable; if income tax had been deducted on each instalment as it was paid, without dissecting it into its component parts of repayment of capital and payment of interest, there would

(1) 3 H. & N. 769. (2) [1903] A. C. 299.
(3) [1901] A. C. 26.

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have been an obvious case of taxation of capital. The question really depends on the proper construction of the two contemporaneous deeds, and when these are carefully looked at it becomes obvious that the object underlying the whole arrangement was that until the date at which the leasehold interest sold by the plaintiff should come to an end he should receive the same rent that he would have received had he not parted with it. The case falls within the very words of s. 102 of the Income Tax Act, 1842, which is the original section under which annuities and other annual payments were charged with duty; and it is equally within the language of s. 40 of the Income Tax Act, 1853. The defendants were obliged to make the deductions and had no discretion in the matter, the language of s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, being imperative on that point: per Lord Macnaghten in *London County Council* v. *Attorney-General*. (1) The recent decision of Phillimore J. in *Delage* v. *Nugget Polish Co.* (2), in which the defendants were held to be right in deducting income tax on annual payments, which were not fixed in amount but were calculated at 8 per cent. on the gross receipts for sales made for them, is a strong authority in favour of the defendants. In *Foley* v. *Fletcher* (3) a gross sum was arrived at, upon which the amount of the instalments was calculated.

[They also cited *Attorney-General* v. *Shield*. (4)]

Tyrrell T. Paine, in reply.

Cur. adv. vult.

April 14. The following written judgment was delivered by

WALTON J. [After stating the facts as above set out, the learned judge proceeded:—] The action is brought in respect of the balance of three instalments, which has in each case been deducted by the defendants in respect of income tax. They claim to be authorized and entitled to make such deductions by virtue of s. 40 of the Income Tax Act, 1853, which is (so far as it is material) in these words: "Every person who shall be liable to the payment of any rent or any yearly interest of

(1) [1901] A. C. 26, at p. 40.
(2) (1905) 21 Times L. R. 454.
(3) 3 H. & N. 769.
(4) (1858) 3 H. & N. 834.

money or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act, that is to say, sevenpence, sixpence, or fivepence, as the case may be, for every twenty shillings of such payment." The defendants contend that they are, in the words and within the meaning of that section, a "person liable to the payment of an annuity or annual payment"—that is to say, the 1625*l.*—"as a personal debt or obligation by virtue of a contract"—that is, the deed of covenant. If this is so, it seems to me clear that the defendants were entitled and authorized to make the deduction in question, and therefore to succeed in this action. It does not appear to me necessary to consider the question whether they were bound to make the deduction under s. 24, sub-s. 3, of the Act of 1888 (51 & 52 Vict. c. 8).

As to the general history and effect of the Income Tax Acts in their bearing upon annuities, it is sufficient for me to refer to the judgment of Lord Macnaghten in the case of *London County Council* v. *Attorney-General*. (1) What I have to decide is whether the annual payment of 1625*l.*, payable under the deed to which I have referred, is an "annuity or annual payment" within the meaning of s. 40 of the Income Tax Act, 1853. In considering this question the general scheme of the legislation as to annuities in the Income Tax Acts must be kept in mind. It is admitted that there may be, in the words of the Act, an annual payment payable as a personal debt by virtue of a contract which is not an "annuity or annual payment" within the meaning of s. 40. If there is a sum of money owing by a debtor to his creditor, and it is agreed between them that the debt shall be paid by annual instalments, it is admitted that the annual instalments are not annual payments within the meaning of the section; further

(1) [1901] A. C. 26, at pp. 37–40.

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than this, it appears from *Foley* v. *Fletcher* (1) and *Secretary of State in Council of India* v. *Scoble* (2) that where the debt and the obligation to pay the instalments are created by the same instrument the same rule applies, and the instalments are not annual payments within s. 40. It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments; in the other there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum.

In the present case the agreement was in substance that the defendants, in consideration of the assignment to them of a certain leasehold interest in an unexpired residue of a term ending on December 25, 1912, would pay to the assignors a fixed amount of 1000*l.*, and make to them an annual payment of 1625*l.* by equal quarterly payments until the expiration of the term. That 1625*l.* was the net rent which the assignors at the date of the assignment were receiving under certain sub-leases which they had made of the leasehold premises. It is said that the annual payments of 1625*l.* are really in substance instalments of the price, or of part of the price, payable for the leasehold interest sold. I asked the plaintiff's counsel in the course of the argument what was the gross amount payable, but I received no satisfactory answer to the question. It is plain to me that no estimate of any gross amount was involved in the contract between the parties. What the vendors bargained for was that they should continue to receive until the end of the term the same amount of income which they were receiving from the property at the date of the assignment, and that they should be paid in addition a lump sum of 1000*l.* In my judgment the annual payments of 1625*l.* were not

(1) 3 H. & N. 769. (2) [1903] A. C. 299.

paid as instalments of a debt, but were amounts payable and receivable as income, just in the same manner as an annuity which is payable for a certain number of years under a covenant or contract made in consideration of a sum of money paid by the annuitant as the price of the annuity. It seems to me to make no difference whether the contract to make the annual payments is entered into in consideration of money paid or in consideration of property assigned. For these reasons I think that the present case is not within *Foley* v. *Fletcher* (1), or *Secretary of State in Council of India* v. *Scoble* (2), or the judgment of Jelf J. in *East India Ry. Co.* v. *Secretary of State for India* (3), but is similar to the case of *Delage* v. *Nugget Polish Co.* (4), recently decided by Phillimore J. I think that the annual payments in question were annual payments within the meaning of s. 40 of the Income Tax Act, 1853, and that therefore the defendants were entitled to make the deductions, and must succeed in this action.

Judgment for the defendants

Solicitors for plaintiff: *Finch & Turner.*
Solicitor for defendants: *Japheth Tickle.*

(1) 3 H. & N. 769.
(2) [1903] A. C. 299.
(3) (1904) 21 Times L. R. 3 (see ante, p. 413).
(4) 21 Times L. R. 454.

W. J. B.

C. A.
1905
June 26.

[IN THE COURT OF APPEAL.]

BORTHWICK *v.* THE ELDERSLIE STEAMSHIP COMPANY, LIMITED (No. 2).

Practice—Judgment of Court of Appeal—Entry of Judgment—Action for unliquidated Damages—Judgment for Defendant in Court of First Instance—Reversal on Appeal—Damages to be ascertained—Interest on Amount recovered—Judgment taking effect from Time when given—Antedating—Order XLI., *r.* 3.

Where a plaintiff fails in a Court of first instance on a claim for unliquidated damages, but on appeal an order is made that judgment should be entered in his favour for an amount of damages to be ascertained, the judgment does not, as a matter of course, take effect from the date of the trial of the action, so as to entitle the plaintiff to interest from that date upon the amount recovered, but it will only take effect from the date at which it was given in the Court of Appeal, unless an order is made by that Court under Order XLI., r. 3, that its judgment shall be antedated.

APPLICATION for directions as to the entry of judgment for the plaintiff, pursuant to a previous order of the Court of Appeal.

At the trial of the action before Walton J. judgment was entered for the defendants. An appeal to the Court of Appeal was allowed (1), and the judgment (omitting formal parts) was drawn up in the following terms: "It is ordered that the plaintiff's appeal be allowed; that the above-mentioned judgment of the Honourable Mr. Justice Walton of the 9th day of March, 1903, be wholly set aside, and instead thereof that judgment be entered in the action for the plaintiff against the defendants on all issues, for such sum as may be assessed by a referee to be agreed upon by the parties. . . . Liberty to apply." Upon a further appeal to the House of Lords the judgment of the Court of Appeal was affirmed. (2) The assessment of damages stood over by consent pending the appeal to the House of Lords, but subsequently the amount for which judgment should be entered for the plaintiff was agreed between the parties, and it was further agreed that interest should be

(1) [1904] 1 K. B. 319. (2) [1905] A. C. 93.

paid, but no time was specified with regard to this matter. The agreed amount of damages was paid to the plaintiff, but a dispute arose as to the date from which interest ought to run, the defendants being willing to pay interest from the time when the amount of damages was determined until payment thereof, and the plaintiff claiming interest from the date of the judgment given by the learned judge at the trial. This application was made in pursuance of the liberty to apply reserved by the judgment of the Court of Appeal.

J. A. Hamilton, K.C., and *Maurice Hill*, for the plaintiff. The question of the amount of damages to which the plaintiff was entitled, the amount not being a liquidated sum, necessarily stood over until the liability of the defendants was determined. The damages have now been agreed, and judgment is to be entered for the amount so agreed with interest. The question from what time the interest should run is an important one, owing to the long delay since the trial, and it depends upon the date as of which the judgment should be entered. Order LVIII., r. 19, provides for interest where execution is delayed by appeal. It is true that there was no execution in this case, but only a judgment as to liability which made it impossible to assess damages, but the principle governing that rule should be applied. The Court of Appeal reversed the judgment below, and gave the judgment which should have been given in the first instance. The order made on appeal amounts to a substitution of the judgment of the Court of Appeal for that given at the trial, and consequently the judgment for the agreed amount of damages should be treated as if it had been given at the trial, and should be entered as if it had been given on that date, so as to carry interest from that time. At all events, under Order XLI., r. 3, this Court has power to antedate its judgment, and even if it does not ipso facto relate back to the time of the trial the Court can, on this application, direct that it shall do so.

Carver, K.C., and *Leck*, for the defendants. It is not now disputed that where damages are to be ascertained interest on the amount recovered runs from the date of the judgment. The

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question is what is the date of the judgment under which the plaintiff recovers damages. This must be determined by the provisions of the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 17, by which every judgment debt is to carry interest from the time of entering up the judgment. The first judgment that the plaintiff obtained was that given in the Court of Appeal, and interest on the amount ultimately ascertained to be due runs only from the date of that judgment. In the case of an execution the amount must have been already ascertained, and so Order LVIII., r. 19, has no application by analogy or otherwise to this case. The power given to the Court to antedate its judgment is exceptional, and is only applicable to exceptional cases such as *Ecroyd* v. *Coulthard* (1) and *Turner* v. *London and South Western Railway* (2), and not to the case where the delay up to the time of the appeal was not due to any wrongful act of the defendants, but only to their success in supporting what they believed to be their rights. No application was made at the time to the Court of Appeal to antedate its judgment, and it is submitted that no cause has been shewn why it should now do so.

Maurice Hill, in reply.

COLLINS M.R. This is an application on the part of the plaintiff that judgment should be entered for him with interest. At the trial the learned judge gave judgment for the defendants, and consequently at that time there was no sum payable to the plaintiff. That decision was reversed by this Court, and our judgment, in favour of the plaintiff, for an amount to be ascertained, was affirmed on appeal to the House of Lords. The result of the litigation has unquestionably been that there was a long interval between the trial of the action and the time when it was finally ascertained that the plaintiff was entitled to judgment. The amount of damages to which the plaintiff is entitled has been agreed between the parties and is to be paid with interest. The sum due having been ascertained, the plaintiff claims interest upon it, not merely from the date when it was first decided that he was entitled to recover

(1) [1897] 2 Ch. 554. (2) (1874) L. R. 17 Eq. 561.

judgment, but from the date of the trial, on the ground that if his rights had been understood at the hearing he would have been entitled to an inquiry as to the amount of damages, and judgment would been entered for a sum to be ascertained, carrying interest from the date of the judgment. But at the trial he did not obtain judgment, and he had to come to this Court, in which, for the first time, he was successful. If we apply to these circumstances the practice applicable under Order XLI., r. 3, to a judgment in a Court of first instance, all to which he would be entitled would be to have judgment entered for him as of the date on which it was given, that is, the hearing in this Court, with interest from the time when that judgment was pronounced. That rule runs as follows: "Where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or judge shall otherwise order, and the judgment shall take effect from that date: provided that by special leave of the Court or a judge a judgment may be antedated or postdated." There can be no doubt that under Order LVIII., r. 1, an appeal to a Court of Appeal is a rehearing, and though by rule 4 of the same order the Appeal Court has all the powers of the High Court, including the power to give any judgment and make any order which ought to have been made by the Court of first instance, still the judgment of the Court of Appeal is a judgment of the date on which it was given, and it would require the invocation of the powers given by Order XLI., r. 3, if that judgment is to be antedated. The judgment is not ipso facto antedated by reason that it is substituted for the judgment in the Court below. The power to antedate ought, in my opinion, only to be used on good ground shewn, and when I examine the facts of this case I can find no such ground. There was no delay attributable to one of the parties, no contumacy or unreasonable act of the defendants, who ought not to be treated as in default by reason of the postponement of the question of their liability, as if it arose from an act of theirs. I think, therefore, that no case has been shewn for antedating the judgment of this Court in order that the

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Collins M.R.

plaintiff may get interest for the time that elapsed between the trial and that judgment.

When the principle on which the case of *Caledonian Railway* v. *Carmichael* (1), which was applied in this Court in *Richard and Great Western Railway* (2), is examined, it will be found to bear out the view I have expressed. In the first-mentioned case, under the Lands Clauses Consolidation (Scotland) Act, 1845, a claim was made by a landowner for compensation payable by the railway company in respect of minerals, the value of which was to be ascertained by arbitration. The head-note is as follows: "Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand, it was held by the House, reversing the decision below, that the right to interest on the principal sum did not commence until after the debt had been established, and the precise amount settled. A sheriff's jury, awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to 5272*l.*, saying, however, nothing as to interest. The Court below added to the principal sum twelve years' interest. Their order reversed. *Per* Lord Westbury: Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld." The point that was decided in that case does not arise in the present one, but the principle of the decision helps us in dealing with this case. In that case there had been long delay in determining the amount payable to the landowner and loss to him arising thereby; but the principle to be gathered from the decision is that till the sum was ascertained there was no exigency on the railway company to pay anything, and consequently no sum on which they could be called on to pay interest. Lord Westbury pointed out that interest could only be demanded by virtue of a contract, or where the principal money had been wrongfully withheld. Wrongful withholding of money due would be a cardinal factor in determining whether we ought to antedate the judgment of this Court, but where the withholding merely arises in the ordinary process of ascer-

(1) (1870) L. R. 2 H. L., Sc. 56. (2) [1905] 1 K. B. 68.

taining liability it could not properly be called wrongful. The plaintiff in this case was in a position similar to that of the landowner in the case in the House of Lords, in this respect—that there was delay in ascertaining the amount to which he was entitled owing to the failure to establish at the trial that he was entitled to anything. I think that, while the Court has power to antedate a judgment, we ought not to do so in this case; and it follows that the plaintiff will only be entitled to interest from the date of the judgment in this Court.

I recognise, and my brother Romer agrees with me, that it is not desirable to say what the result of this application would have been had the amount claimed at the trial been a fixed sum, and had the only question for decision been whether it was due or not.

The result of the application is that judgment will be entered for the plaintiff for the agreed damages, with interest upon the amount from the date of the judgment in this Court.

ROMER L.J. I am of the same opinion. In deciding on this application it ought to be borne in mind that when a case comes before this Court on appeal there is a rehearing of it. The effect of this is shewn very clearly by the decision in *Quilter* v. *Mapleson* (1), in which it was pointed out that the power of the Court of Appeal is not merely to make any order which ought to have been made by the Court below, but to make such further or other order as the case may require. When a plaintiff has failed in the Court below so that his action has been dismissed, if he succeeds on appeal it cannot, I think, be properly said that the judgment of the Court of Appeal must be regarded for all purposes as if it had been the judgment given by the judge in the Court below. The judgment in favour of the plaintiff must be treated as of the date on which it was given in the Court of Appeal, subject to the right of that Court to antedate its judgment. That right should, in my opinion, be exercised with caution. In the present case the plaintiff failed at the trial; but this Court took the view that he was

(1) (1882) 9 Q. B. D. 672.

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Romer L.J.

entitled to recover damages, the amount of which remained to be ascertained. The amount has since been ascertained, and must be treated as if it had been mentioned in the judgment of this Court; and the result is that the plaintiff has a judgment for an ascertained sum, dated on the day on which it was pronounced. It was certainly not antedated at the time it was given, and I do not see any sufficient ground for now antedating it. The parties have agreed on the amount of damages, and that the amount shall bear interest, though from what date interest should run was not stated. As a mere matter of construction I should think that on this agreement interest would run from the date on which this Court gave the judgment which entitled the plaintiff to damages. Therefore, as a matter of principle, and also on the construction of the agreement, I am of opinion that interest will only be payable from the date on which that judgment was given.

Judgment entered for the plaintiff for agreed amount, with interest from the date of the hearing on appeal.

Solicitors for plaintiff: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Lowless & Co.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1905
July 10.

EDMONDSON *v.* BIRCH & CO., LIMITED.

Practice—Discovery—Interrogatory—Defamation—Privilege—Information on which Defamatory Statement founded—Name of Informant—Interrogatory not administered bonâ fide for Purposes of Action.

In an action for libel, in which the defence of privilege was set up, the plaintiff sought to administer to the defendants an interrogatory inquiring what information the defendants received which induced them to make the statement complained of, and from whom that information was derived. The Court being of opinion from correspondence which had passed between the parties that the interrogatory as framed was not put bonâ fide for the purposes of the pending action, but in order to enable the plaintiff to bring an action against a person or persons from whom the information was derived:—

Held, that the part of the interrogatory which asked from whom the information was derived must be disallowed.

APPEAL against an order made by A. T. Lawrence J. at chambers allowing an interrogatory as after mentioned.

The action, which was for libel, was brought by the plaintiff, a mining agent, against the defendants, a company carrying on business in London, in respect of a cablegram sent by the defendants under the following circumstances. A firm in Japan, who acted as the defendants' representatives in that country, had engaged the plaintiff in their service, subject to the approval of his engagement by the defendants. On being communicated with by the firm in Japan with regard to the engagement, the defendants cabled to them as follows: "Have no dealings with Edmondson: give notice of dismissal." The plaintiff was thereupon dismissed, and subsequently brought the action complaining of the cablegram as libellous, and alleging by way of innuendo that it imported that the plaintiff was an untrustworthy and dishonest person, and not a man of business integrity fit to be employed in a responsible business capacity. The defendants pleaded, among other things, that the words complained of were a privileged communication.

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The plaintiff applied for leave to administer to the defendants (among others) the following interrogatory: "What information, if any, had the defendants received, detrimental or otherwise to the character of the plaintiff, prior to the despatch of the said cablegram, which induced them to send the same? From whom was such information derived? Did the defendants take any and what steps to verify it?" A correspondence had taken place prior to the commencement of the action between the plaintiff and one of the directors of the defendant company, the general effect of which appeared to be that the plaintiff stated that he did not impugn the good faith of the defendants or make any complaint against them, but complained that he had been traduced to them by some person, the disclosure of whose name by them he repeatedly demanded in urgent terms. In several letters he suggested that particular persons named were the defendants' informants, and asked to be informed whether that was so. An affidavit made on behalf of the defendants by one of the directors of the defendant company stated that, prior to the commencement of the action, the plaintiff had several interviews with him and another director, in which the plaintiff repeatedly stated that he wished to ascertain whether any person had given information to the defendants in regard to him which had resulted in the sending of the cablegram complained of in the action, and the name of that person, in order that he might institute an action against him, and that the plaintiff threatened that, in the event of such information not being furnished to him, he should institute an action against the defendants with the sole object of obtaining the desired information in the course of the proceedings. The plaintiff made an affidavit in reply denying that he had ever threatened at an interview as alleged that, in the event of such information not being furnished to him, he should institute an action against the defendants with the sole object of obtaining the desired information or at all. As will be seen, the Court arrived at the conclusion from the terms of the correspondence that the interrogatory as framed was not put bonâ fide for the purposes of the pending action, but in order to obtain information for the purpose of bringing an action against some person

or persons who had given information to the defendants on which they had acted in sending the cablegram.

The master allowed the interrogatory, and on appeal the judge affirmed his order.

Montague Lush, K.C., and *J. R. Atkin*, for the defendants. The correspondence and other circumstances clearly shew that this action was really brought, and this interrogatory is sought to be administered, for the purpose of enabling the plaintiff to obtain the name of the person from whom the defendants' information was derived, and to bring an action against him. Where there is ground for thinking that such an interrogatory as this is not put bonâ fide for the purposes of the pending action, but in order to obtain materials for bringing an action against another defendant, it ought not to be allowed: see per Collins M.R. in *White* v. *Credit Reform Association and Credit Index, Ld.* (1) If such an interrogatory were allowed under circumstances of this kind, no person could in the course of business make any confidential inquiry with regard to the character or qualifications of any one whom he was proposing to employ.

[They also cited *Dalgleish* v. *Lowther* (2); *Elliott* v. *Garrett*. (3)]

Marshall Hall, K.C., and *A. S. Poyser*, for the plaintiff. The authorities shew that the plaintiff in an action of libel is entitled to administer an interrogatory such as this, in order to prove malice, and so rebut the defence of privilege, and in order to determine whether he can safely proceed to trial. If the interrogatory is on a matter relevant to the pending action, the plaintiff ought not to be deprived of his right, because it may be an incidental result of the disclosure of the name of the defendant's informant that the plaintiff may discover that he has a right of action against him.

ROMER L.J. In an action of libel in which privilege is pleaded no doubt the Court has jurisdiction in a proper case to allow the plaintiff, with a view to rebutting the plea of

(1) [1905] 1 K. B. 653, at p. 658. (2) [1899] 2 Q. B. 590.
(3) [1902] 1 K. B. 870.

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EDMONDSON v. BIRCH & Co., LIMITED.

Romer L.J.

privilege, to administer an interrogatory to the defendant, asking what inquiries the defendant made as to the truth of the statements complained of before publishing them, and from whom he obtained the information on which he relied in publishing those statements. But, though the Court has jurisdiction to allow an interrogatory asking from whom such information was obtained, as was decided in *White* v. *Credit Reform Association and Credit Index, Ld.* (1), undoubtedly an interrogatory of that kind is one which ought to be regarded with some caution and jealousy, for it might in some cases be made an engine of great oppression. This was pointed out by Collins M.R. in *White* v. *Credit Reform Association and Credit Index, Ld.* (1), where, after stating that the Court had jurisdiction to allow an interrogatory asking the defendant to give the names of the persons from whom his information was obtained, he said: "In some cases, of course, countervailing rights and considerations might have to be taken into account. There might in some cases be ground for thinking that the inquiry as to the persons from whom the information was obtained was made with some illegitimate motive, and that the plaintiff was really seeking to assert some right of action against the persons who gave the information to the defendant. If there were ground for the suggestion that the inquiry was not made bonâ fide for the purposes of the pending action, and therefore was made for other purposes than those for which the law allows interrogatories, then such an interrogatory would be oppressive and illegitimate, and ought not to be allowed." I need only say with regard to the present case that the letters which have passed between the parties convince me that it falls within the words of the Master of the Rolls which I have read. I am satisfied that in this case the question asked as to the persons from whom the defendants obtained their information is asked with an illegitimate motive, and that the plaintiff here is really seeking to assert a right of action against some person other than the defendants, and is not making the inquiry bonâ fide for the purposes of the present action. Therefore I think that the Court will be acting wisely in not allowing the interroga-

(1) [1905] 1 K. B. 653.

tory as framed, and that it ought to be in part disallowed. So far as it asks what information the defendants had received detrimental or otherwise to the character of the plaintiff, prior to the despatch of the cablegram, which induced them to send it, I think the interrogatory ought to be allowed. The rest of the interrogatory, which asks from whom such information was derived, and what steps the defendants took to verify it, must be disallowed. To that extent I think the appeal must be allowed.

MATHEW L.J. I am of the same opinion. I share the view expressed by Romer L.J. as to the danger of allowing an interrogatory of this kind, where there is reason to think that it is not administered in perfect good faith. The proper object of such an interrogatory is to furnish evidence of malice, and so rebut the plea of privilege, by shewing that the defendant, in publishing the statement complained of, acted without information, or upon information of such a character that no person could reasonably be supposed to have acted upon it. Where administered with that object, the interrogatory is legitimate. But can any one, who has read the correspondence in this case, doubt that the object of the plaintiff in this action is really to obtain discovery for the purpose of bringing another action? The plaintiff in his letters appears to concede that the defendants acted in perfect good faith, but to assert his right to compel them to assist him to bring an action against some other person or persons.

Appeal allowed.

Solicitors for plaintiff: *Jacksons & Elwell.*
Solicitors for defendants: *Greenip, Snell & Co.*

E. L.

1905
June 7, 8.

DAVIS *v.* PETRIE.

Bankruptcy—Deed of Assignment for Benefit of Creditors—Effect of Payment to Trustee under Deed—Act of Bankruptcy—Relation back of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 49.

Payment, with full knowledge, to the trustee under a deed of assignment for the benefit of creditors is not a protected transaction, where, within three months of the execution of the deed, a receiving order is made against the grantor.

APPEAL from a decision of the judge of the Brompton County Court.

The plaintiff, who was the trustee in bankruptcy of one William Watson, a builder, sued the defendant Mrs. Petrie for the sum of 21*l.* in respect of work done for her by Watson. The defendant pleaded payment by a cheque for 21*l.* dated June 12, 1903, drawn in favour of one Afford, the trustee under a deed dated June 5, 1903, executed by Watson, whereby he assigned all his property to Afford on trust for sale, conversion, and collection, and out of the net proceeds for payment to the creditors of Watson rateably in accordance with the law of bankruptcy.

A petition in bankruptcy having been presented against Watson alleging the execution of the deed of assignment of June 5, 1903, as an act of bankruptcy, a receiving order was made against him on August 20, 1903, and he was thereupon adjudicated a bankrupt.

The defendant paid the cheque for 21*l.* to Afford in consequence of a letter received from him dated June 6, 1903, in which he stated that he had been appointed trustee under the deed of assignment which Watson had executed for the benefit of his creditors, and requesting payment of the sum in question. The 21*l.* paid by the defendant not having been paid over by Afford to the plaintiff, as trustee in Watson's bankruptcy, the plaintiff brought this action against the defendant to recover the same, and the question was whether the payment made to

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Afford, as trustee under the deed of assignment, was a good discharge of the debt.

The county court judge gave judgment for the defendant, expressing the view that although the literal construction of s. 43 of the Bankruptcy Act, 1883, was in favour of the plaintiff, the argument ab inconvenienti was strongly against him, and that the nullity of the deed of assignment consequent on the bankruptcy within three months must be impliedly qualified so as to except from its operation acts rightly done under it. (1)

The plaintiff appealed.

S. R. Earle, for the plaintiff. The county court judge was wrong in coming to the conclusion that payment of her debt to the trustee under the deed of assignment was a good discharge, inasmuch as the execution of that deed was an act of bankruptcy upon which the grantor was within three months adjudicated a bankrupt. Under s. 43 of the Bankruptcy Act, 1883, the plaintiff's title as trustee in bankruptcy related back to the execution of the deed of assignment; for all purposes of the bankruptcy that deed became void, and the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed: see per Lord Esher M.R. in *In re Pollitt, Ex parte Minor*. (2) There is nothing to justify the suggestion that s. 43 is to be read subject to the qualification put upon it by the county court judge. The object of s. 43 is to preserve the whole of the bankrupt's property for his creditors; the section must, therefore, be construed with reference to that purpose: see per Fry L.J. delivering the judgment of the Court in *In re Burdett, Ex parte Byrne*. (3) The payment to the trustee under the deed not being a protected transaction, having been made with notice of the deed, the defendant is liable to pay the debt over again. [He also referred to *Stein* v. *Pope*. (4)]

Frank Mellor (*Giveen* with him), for the defendant. The county court judge was right. Until the deed of assignment

(1) Other points were discussed and dealt with in the county court and also on the appeal, but these do not call for a report.

(2) [1893] 1 Q. B. 455.

(3) (1888) 20 Q. B. D. 310, at p. 314.

(4) [1902] 1 K. B. 595.

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was upset it remained valid; it was voidable only, not void: see per Romer L.J. in *Stein* v. *Pope* (1); therefore what was done under it before it was avoided is protected by s. 49 of the Bankruptcy Act, 1883. The trustee under the deed of assignment could have successfully sued the defendant immediately after the execution of the deed; the defendant would have no answer to that action. Until the deed was avoided, the trustee acting under it for the general body of creditors could properly sue.

LORD ALVERSTONE C.J. The county court judge says in terms that the language of s. 43 of the Bankruptcy Act, 1883, is opposed to the view he has taken in this case, and it is plain that the literal construction of that section is in favour of the contention of the plaintiff. None of the authorities referred to in the judgment of the county court judge appears to me to support the view that a payment such as that in the present case, with notice, is protected. We were pressed by Mr. Mellor to say that if Afford, the trustee under the deed, had brought an action against the defendant for the 21*l.*, she would have had no defence to it. Afford was only an assignee, with all the equities of an assignee, under a title which ex hypothesi would come to an end if an act of bankruptcy took place, and the deed was in itself an act of bankruptcy. How, then, it can be said that there could have been no answer by the defendant to such an action brought by Afford, I am unable to understand. Mr. Mellor further contended that payment to Afford, the trustee under the deed, is a protected transaction. As to that I would point out this—that a payment to the bankrupt is not protected if the person making the payment has notice of an act of bankruptcy; and I am of opinion that a payment with notice to the assignee of the bankrupt stands in no better position. There are cases where, if a person is bound to do something, as, for instance, to hand over chattels, he must fulfil his obligation: such a transaction is protected. That, however, has no application to the present case. Here, the defendant, with full knowledge of the act of bankruptcy,

(1) [1902] 1 K. B. 595.

thought fit to pay the debt to the trustee under the deed; that is not a protected transaction, and the plaintiff is entitled to recover judgment. The appeal must, therefore, be allowed.

KENNEDY J. I am of the same opinion. It is curious that there is no decision on the point raised in this case. What are the facts? Afford took a deed of assignment from Watson, which, in itself, was an act of bankruptcy on which Watson could be, and was, adjudged a bankrupt. Afford then wrote to the defendant saying that as she was indebted to Watson she would have to pay the debt to him—Afford—as he had been appointed trustee under the deed of assignment executed by Watson. It is suggested that although there was no antecedent contract between Afford and the defendant, yet that the defendant would have been in law bound, if sued by Afford under the deed, to pay the debt to him, and that, although both knew that the execution of the deed was an act of bankruptcy on the part of Watson, the payment made by the defendant to Afford is not void by s. 43 of the Bankruptcy Act, 1883. If such a payment is protected, the protective section—s. 49—as to payments made without notice would appear to be unnecessary. A distinction has been attempted to be drawn between a payment to the trustee under the deed of assignment and one made to the bankrupt himself. I am unable to see any distinction.

RIDLEY J. I agree, and have nothing to add.

Appeal allowed.

Solicitors for plaintiff: *Braby & Macdonald.*
Solicitors for defendant: *Gerald & Arthur Marshall.*

F. O. R.

1905
June 22.

FORDER *v.* GREAT WESTERN RAILWAY COMPANY.

Carrier—Railway Company—Owner's Risk Note—Mode of Packing likely to cause Injury—Notice to Company—Wilful Misconduct.

A parcel of sheepskins which had been delivered by the plaintiff to the defendants for carriage from Paddington to Winchester arrived at their destination in a damaged condition owing to their having been packed in a truck with wood chips, which had become entangled in the wool. The plaintiff wrote to the station-master at Winchester complaining of the damage, and asking him to communicate with the authorities at Paddington to prevent a recurrence of the injury, as further consignments of sheepskins were expected to be sent off from thence shortly. He received a reply saying, "I have asked our Paddington people not to use the kind of litter you object to in the future." Subsequently, the plaintiff sent a second parcel of sheepskins from Paddington to Winchester on the terms of an "owner's risk" note, whereby he relieved the defendants from liability for damage except upon proof that it arose from wilful misconduct on the part of the defendants' servants. This parcel, like the first, arrived damaged from being put into trucks containing wood chips. In an action to recover for the damage to the second parcel:—

Held, that, in the absence of proof that the persons who actually loaded the goods in the trucks or who superintended their loading had notice that the mode of packing employed was likely to be injurious to the goods, there was no evidence of wilful misconduct on the part of the defendants' servants; the mere fact that some other official of the defendants had that notice was not sufficient.

APPEAL from Winchester County Court.

The plaintiff, a fellmonger carrying on business at Winchester, on October 7, 1904, delivered to the defendants at Bermondsey station a parcel of 137 sheepskins for carriage viâ Paddington to Winchester on the terms of a "consignment note for goods to be carried at owner's risk," whereby, in consideration of the defendants receiving and forwarding the goods to be carried at a reduced rate below their ordinary rate, he agreed to relieve them from liability "for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants." On arrival of the skins at Winchester it was found that they were damaged owing to their having been packed in a truck upon a bedding of wood chips, and to the chips having become

entangled in the wool. The plaintiff on the same day wrote to the station-master at Winchester as follows: "137 skins from Bermondsey Market and Paddington this morning were loaded in a truck covered with wood chips which is very injurious to sheepskins and is totally unnecessary and wrong to be used when they are loaded. I am injured to the extent of fully 1*d.* per skin to clear off this objectionable matter, which I claim from the company, say, 11*s.* 5*d.* . . . . Communication should be sent to Paddington this A.M. as there will be more skins sending to-day from there, to prevent the recurrence of this injury.—W. Forder." On November 7 the plaintiff wrote again, pressing his claim in respect of the above damage, and received on the same day the following reply from the station-master at Winchester: "Sir,—With reference to your claim for 11*s.* 5*d.* respecting alleged damage to sheepskins from Paddington, I regret to inform you that owing to the 'owner's risk' conditions of carriage the company must respectfully decline to entertain the claim. I have, however, asked our Paddington people not to use the kind of litter you object to in the future." On December 21 the plaintiff delivered to the defendants a second parcel of 267 sheepskins at Bermondsey for carriage viâ Paddington to Winchester on the terms of a similar owner's risk note. On delivery of the skins at Winchester they were found to be covered with wood chips and injured in the same manner as the first parcel. The plaintiff sued the defendants in the Winchester County Court to recover 11*s.* 5*d.* for damage to the first parcel, and 1*l.* 2*s.* 3*d.* for damage to the second. The judge dismissed the plaintiff's claim in respect of the first parcel on the ground that there was no evidence of wilful misconduct on the part of the company's servants. But with regard to the second he held that, as the company had had their attention specifically called to the fact that the packing of sheepskins in wood chips was likely to produce damage, the subsequent adoption by their servants of that mode of packing amounted under the circumstances to wilful misconduct, and he accordingly gave judgment for the plaintiff for 1*l.* 2*s.* 3*d.*

The defendants appealed.

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Asquith, K.C., and *E. A. Hume*, for the defendants. The effect of the authorities as to the meaning of the term "wilful misconduct" in an owner's risk note is thus summarized by Johnson J. in *Graham* v. *Belfast and Northern Counties Ry. Co.* (1): "Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences . . . . It is not sufficient, I think, that the facts proved from which the injury arose are consistent with wilful misconduct; they ought to be inconsistent with the absence of wilful misconduct." The facts of the present case do not come within the rule so stated. There must have been actual knowledge on the part of the particular servants of the company who packed or superintended the packing of the skins that the mode of packing adopted was likely to be injurious, or there must have been recklessness as to the consequences of adopting that mode. It was not enough to shew that some other servants of the company had notice that injury was likely to result; the notice ought to have been brought home to the servants who did the act complained of. It may be that the station-master at Winchester communicated the plaintiff's warning to the goods manager at Paddington, but there is nothing to shew that he passed it on to the persons who packed the skins, and an omission on his part to do so is consistent with negligent forgetfulness and nothing more. Further, in the absence of evidence to the contrary, it must be assumed that the station-master's letter to Paddington told the authorities nothing more than in his letter to the plaintiff he said he had told them, namely, that the plaintiff objected to that kind of litter. But that does not necessarily convey that there is any danger in using it.

(1) [1901] 2 I. R. 13.

Foote, K.C., and *R. Whitehead*, for the plaintiff. It is sufficient that notice was given to officials of the company whose duty it was to pass it on to the proper quarter. The plaintiff requested the station-master at Winchester to send his warning on to Paddington, and was told in reply that it had been done. What more could the plaintiff possibly have done to affect the company's servants with knowledge? He could not know beforehand which particular servants would be employed to pack the skins.

Asquith, K.C., in reply. The fact that the plaintiff would experience a difficulty in warning the persons who actually superintended the packing of the skins was one of the disadvantages that he took upon himself when he agreed to have the goods carried at the lower rate.

LORD ALVERSTONE C.J. This is one of those cases which come very near the line; but I have come to the conclusion, though not without hesitation, that there was no evidence on which the county court judge could find that the defendants' servants were guilty of wilful misconduct. I desire, however, to say, speaking for myself, that I do not think it was necessary, in order to establish a case of wilful misconduct, to shew that the porters who actually loaded the wool into the truck knew that packing it in wood shavings would be likely to cause damage. If there had been evidence sufficient to justify the inference that the person in charge of the loading at Paddington knew that this mode of packing was injurious, and nevertheless permitted it to be adopted, I think there would be wilful misconduct, although the porters who actually did the work knew nothing about it. I am quite prepared to adopt, with one slight addition, the definition of wilful misconduct given by Johnson J. in *Graham* v. *Belfast and Northern Counties Ry. Co.* (1), where he says: "Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows

(1) [1901] 2 I. R. 13.

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and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences." The addition which I would suggest is, "or acts with reckless carelessness, not caring what the results of his carelessness may be." In *Lewis* v. *Great Western Ry. Co.* (1) Brett L.J. states the law in much the same language: "If it is brought to his notice that what he is doing or omitting to do may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct." Now the evidence here is that notice of the risk of damage attending the mode of packing was given to the station-master at Winchester, and he in reply said: "I have asked our Paddington people not to use the kind of litter you object to in the future." In the absence of any evidence as to the persons at Paddington to whom that communication was made, and as to the terms in which it was made, it must be assumed that it was made in the terms of the above letter to the goods manager or one of the other responsible authorities; and I will further assume that it was brought to the notice of the person who controlled the loading of the plaintiff's goods. But that is not enough. All that it conveys to the reader's mind is that that kind of litter is objected to, not that if used it will be likely to do substantial damage to the goods. If any further communication was made to the person in charge of the loading at Paddington the plaintiff ought to have proved it. I think the appeal must be allowed.

KENNEDY J. I am of the same opinion. By the terms of the consignment note the onus of proof, upon the issue whether the damage arose from wilful misconduct on the part of the company's servants, is cast upon the plaintiff. In my opinion he did not discharge that burden. The county court judge in

(1) (1877) 3 Q. B. D. 195, at p. 210.

his judgment said that in his opinion, "if a railway company knows that in any particular description of traffic it will cause or probably cause damage to goods if a particular system of packing be adopted, and that system is adopted by their servants with regard to any goods carried by the company, and consequent damage to the goods ensues, the owner of the goods consigned under a consignment note in the form of that in the present case may be entitled to recover damages on the ground of wilful misconduct having caused the damage." With that view I cannot agree. In my opinion, the knowledge which is necessary to give rise to a charge of wilful misconduct must be knowledge on the part, not of some official of the company, nor even of its highest officials, but of the person who under the rules of the company is engaged in, or is entrusted with the control of, the transaction in which the mischief has arisen. The county court judge seems to have thought that it is enough if "the company" knows, in the sense that notice has been given to some official of the company on the company's behalf, and that notice to that person will affect with similar notice the whole of the rest of the company's staff, including the persons engaged in the control or the work of packing the particular goods, so as to create a case of "wilful misconduct." I cannot think that is right. I am willing to assume here that the plaintiff's complaint to the station-master at Winchester was communicated to the proper person at Paddington, whoever that person was. But there is nothing to shew that the persons who had the control and management of the loading of the plaintiff's goods ever had that complaint brought to their knowledge. And it cannot be said that there was wilful misconduct on the part of the defendants' servants who packed the goods merely because the head of the traffic department had received a communication from Winchester which he may have negligently omitted to pass on. Moreover, it does not appear clearly that the station-master at Winchester ever informed the authorities at Paddington that damage had actually occurred as a result of the mode of packing employed, and was likely to recur if that mode were continued. So that even if the

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Kennedy J.

persons who packed the goods had the station-master's letter before them, it does not follow that they realized what the result of continuing that mode of packing might be, and that in continuing it they were consequently guilty of wilful misconduct. It may be that the plaintiff might by administering interrogatories have been able to supply the necessary evidence to support his case; but as the case was presented there was nothing which could be accepted as proof within the meaning of the contract that the servants of the company who had control of the packing knew, or must be taken to have known, that what they were doing would cause injury.

RIDLEY J. I am of the same opinion. I think the knowledge of the person who had the control of the loading of the skins would be the knowledge of the persons who actually put them in the truck. Therefore the requirement that the persons who actually loaded them should have knowledge that what they were doing would be likely to cause damage, so as to render them guilty of wilful misconduct in doing it, would be satisfied by proof that the foreman of the department knew it. But here there was no notice given to either the one or the other of anything beyond the fact that the customer objected to the skins being packed in that particular way. There was nothing to inform them that if they did so pack them they would be likely to be damaged.

Appeal allowed.

Solicitor for defendants: *R. R. Nelson.*
Solicitor for plaintiff: *Snelling, Winchester.*

J. F. C.

LARNER *v.* LARNER.

1905
June 29.

Husband and Wife—Action by Wife against Husband—Detention of Goods—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 17.

An action will lie at the suit of a married woman against her husband for the return of her personal property detained by him.

APPEAL of the defendant from a decision of the deputy judge of the Brompton County Court.

The action was by a married woman against her husband claiming the return of certain goods, her property, or their value. The deputy judge gave judgment for the plaintiff. The defendant appealed. In support of the appeal various points were argued, but it is only necessary to refer to one of them in this report—namely, whether the action would lie.

Cox-Sinclair (*Lampard* with him), for the defendant. A married woman cannot sue her husband in detinue. The right of a wife to sue her husband is conferred by s. 12 of the Married Women's Property Act, 1882, and as regards torts the right is limited to proceedings for the protection and security of her separate property. The section does not include an action, like the present one, in which questions as to title to and possession of property are involved. The plaintiff's proper course was to have proceeded by way of an application under s. 17, which provides that "in any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise in a summary way" to a judge of the High Court or to a county court judge, who may make such order with respect to her property as he thinks fit.

Symmons, for the plaintiff. The action lies. An action by a married woman for the recovery of goods is a remedy for the protection and security of her property. Sect. 17 does not take away any right which is conferred by s. 12. It is a permissive section, and applies only to questions between husband and wife, and if the argument of the defendant is good as to an action against a husband it must equally apply to an action

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against a third party, and a married woman would therefore be precluded from suing a stranger for the recovery of her property. Further, there is no power under s. 17 to award damages for wrongful detention. [He referred to *Bashall* v. *Bashall*. (1)]

Cox-Sinclair replied.

LORD ALVERSTONE C.J. In this case it has been contended on behalf of the defendant that the action will not lie. The question turns on ss. 12 and 17 of the Married Women's Property Act, 1882. Sect. 12 provides that "every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . . for the protection and security of her own separate property, as if such property belonged to her as a feme sole; but except as aforesaid no husband or wife shall be entitled to sue the other for a tort"; and by s. 17, "in any question between husband and wife as to the title to or possession of property" either party may apply to a judge of the High Court or of a county court, who may make such order with respect to the property in dispute as he thinks fit. It is argued for the defendant that the question in this case relates to the title to and possession of property, and that the plaintiff's remedy, therefore, is by an application under s. 17; but in my opinion on the true construction of s. 12 the action does lie. It is clear that the section contemplates some torts in respect of which a wife can sue her husband, provided the protection and security of her property is concerned. The question is what torts are covered by the section, and the difficulty which I have had, and to which there does not appear to be any answer, is that if an action will lie against a husband for damaging a chattel of the wife's, as it clearly would, there does not seem to be any reason why an action should not also lie if the husband is also wrongfully detaining the chattel. It is said that in the latter case a question of title is involved, and that the wife is therefore relegated to her remedy under s. 17. It is not unimportant to observe that s. 17 is an amendment

(1) *The Times*, Nov. 21, 1894.

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of a similar section (s. 9) in the Act of 1870, whereas s. 12 is new; in my opinion the language of s. 17, enabling a husband or wife to have a dispute as to the title to or possession of property determined in a summary way, is not sufficiently strong to take away the right of action conferred by s. 12. I am therefore of opinion that this action lies, and the appeal must be dismissed.

PHILLIMORE J. I agree. At first I was inclined to think that s. 17 barred any proceedings by way of action in a case of this kind, or, to put it more accurately, that, s. 12 being the enabling section, s. 17 had the effect of limiting the scope of s. 12; but I have come to the conclusion that this is not the right view. The Act of 1882 is not a complete code dealing generally with the position and rights of married women. It deals only with their property; and no doubt in the drafting of s. 12 the main idea was that it was necessary to give a married woman the right to take proceedings with regard to her property, and therefore the words "protection and security" were inserted in the section. It would have made the section clearer if the word recovery had also been used, and it is the absence of that word that has given rise to the difficulty. But although I appreciate the objection based on that omission, I see a still greater objection in the point that if s. 12 is limited quoad the husband it is also limited as regards third parties. Further, when one comes to s. 17 one finds that the application which may be made under that section is limited to a dispute between husband and wife as to the title to or possession of property. There is also no power under that section to award damages for injury to or detention of the property. On the whole, therefore, I am of opinion that the language of s. 12 must be considered to be wide enough to include actions for the recovery of all kinds of personal property including choses in action. I say nothing as to an action for the recovery of real property.

JELF J. I agree. For my part I have a much more decided view as to the effect of s. 12 than has been expressed by the

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Jelf J.

other members of the Court. The Act of 1882 was intended to place a married woman in a very different position as regards her separate property from that which she had previously occupied. It having been enacted that a married woman should be capable of holding property as if she were a feme sole, it became necessary to give her remedies with regard to her separate property, and it was only logical to give her the same remedies for the protection of her property as are possessed by any other person. So far from reading the words "protection and security" in s. 12 as being a limitation on the remedies of a married woman in respect of her property, I am clearly of opinion that the section includes actions by a married woman to recover her property and a great deal more. The first thing necessary for the protection of property is means to prevent it from being taken from the owner, or to get it back if it has been taken. The section enables a married woman to prosecute amongst others her husband for stealing her property (provided they are not at the time living together), and it certainly seems a strong thing to say that the same section which confers that right does not enable her to sue her husband in detinue. The provisions of s. 17 seem to me intended to enable certain simple questions in disputes between husband and wife to be dealt with in a summary way. But the section is confined to questions as to title and possession; it does not apply as between a wife and third parties; and there is no power to have the question submitted to a jury or to award damages. It seems to me quite impossible to say that that limited permissive right can in any way cut down or restrict the meaning and effect of s. 12. Actions of this description have, I believe, since the passing of the Act frequently been brought by married women in their own names both against third persons and their husbands.

Appeal dismissed. Leave to appeal.

Solicitors for plaintiff: *Oswald Hanson & Co.*
Solicitor for defendant: *F. Fitz Payne.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1905
April 7, 8.

BRAITHWAITE *v.* FOREIGN HARDWOOD COMPANY.

Sale of Goods—Contract for Delivery of Goods by Instalments—Wrongful Repudiation of Contract by Buyer—Waiver by Buyer of performance of Conditions Precedent—Inferiority of portion of Goods to Description in Contract.

A contract provided for the sale of rosewood for shipment in 1903, to be delivered at Hull in instalments during that year, cash payable against bill of lading. While the first consignment of rosewood was on the sea, the buyers repudiated the contract and refused to accept any rosewood under it upon the ground that the seller had committed a breach of a collateral oral agreement not to supply rosewood to any other person in the trade during 1903. When the bill of lading for the first consignment was tendered to the buyers they refused to accept it or to pay for the rosewood comprised in it; the rosewood was therefore sold by the seller as against the buyers, and the seller claimed as damages from the buyers for their refusal to accept the consignment the difference between the contract price and the price at which it was sold as against the contract. The second consignment, consisting of the balance of the rosewood, was likewise refused by the buyers on the same ground and sold as against them. It subsequently came to the knowledge of the buyers that a portion of the rosewood in the first consignment did not answer the description of the quality of rosewood in the contract, and it was admitted that there was some inferiority in a portion that would be compensated for by an allowance of about 6 per cent. on the value of the consignment. The second consignment was in accordance with the contract. The seller having sued the buyers for damages for not accepting the rosewood, the judge at the trial found as a fact that the collateral oral agreement relied upon by the buyers had never been entered into:—

Held (affirming the judgment of Kennedy J.), that the original repudiation of the contract by the buyers was wrongful, and that by refusing to take delivery of the consignments on arrival on the ground that they had already repudiated the entire contract the buyers had waived the performance of conditions precedent on the part of the sellers, who were entitled to damages based upon the difference between the contract price of the rosewood and the price at which it had been sold by them as against the contract.

APPEAL from the judgment of Kennedy J. in an action tried without a jury.

The action was brought to recover damages for the non-acceptance of about 100 tons of Honduras rosewood sold by

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the plaintiff to the defendants; the defendants pleaded that the purchase was subject to a collateral oral agreement by the plaintiff not to supply Honduras rosewood to any other persons in the trade during 1903, and that, the plaintiff having sold a quantity of rosewood to another firm before delivering any rosewood to the defendants under their contract, the defendants had thereupon repudiated the contract. The defendants further alleged that they were entitled to repudiate the contract on the ground that the shipments of rosewood tendered under the contract were not of good, sound, and merchantable quality.

The plaintiff, who resided in British Honduras, in November, 1902, made a contract with the defendants, who were merchants in London, for the sale to them of about 100 tons of Honduras rosewood at 6*l.* 10*s.* per ton delivered for shipment in the year 1903, cash being payable against bill of lading; the rosewood was to be delivered by instalments. The plaintiff, in pursuance of the contract, shipped about sixty-three tons of rosewood to the defendants on the steamer *Spheroid*, but prior to the arrival of this steamer in England the defendants became aware that the plaintiff had sold 468 pieces of Honduras rosewood to a firm of Churchill & Sim in London, in breach of the alleged agreement between the plaintiff and the defendants, and on October 5, 1903, the defendants wrote to the plaintiff's agent at Hull (which was the port of delivery) repudiating the contract and refusing to accept any wood under it. On October 30 the bill of lading for the rosewood arrived in England and was tendered by the plaintiff's agents to the defendants, who refused to accept it or to pay for the rosewood comprised in it. On November 9 the *Spheroid* arrived in England, and as the defendants refused to accept the rosewood on board it was sold by the plaintiff as against the defendants, and the plaintiff claimed to recover as damages from the defendants the difference between the contract price and the price at which it was sold as against the contract. A second instalment of about thirty tons of rosewood was shipped by the plaintiff on the steamship *Saba*, which arrived in England in January, 1904; on January 18 the bill of lading for that consignment was tendered by the plaintiff's agent to the defendants and refused

by them; the rosewood was then sold as against the defendants as the consignment ex *Spheroid* had previously been. It subsequently came to the knowledge of the defendants that a portion of the rosewood ex *Spheroid*, amounting to about seventeen tons, did not answer to the description of the quality of rosewood in the contract, and it was admitted by the plaintiff that there was some inferiority in respect of this quantity of the rosewood. The consignment ex *Saba* was in accordance with the contract.

At the trial before Kennedy J. the plaintiff denied that any such oral agreement as that relied upon by the defendants had ever been entered into by him or on his behalf, and contended that as the defendants had on October 5 finally repudiated the whole contract of sale on the ground of the alleged breach by the plaintiff of the alleged oral agreement which had never existed, the repudiation was wrongful, and the plaintiff in selling the rosewood had adopted a reasonable and proper course, and was entitled to recover from the defendants the damages claimed in the action. The defendants relied upon the collateral oral agreement, the performance of which by the plaintiff they contended was a condition precedent to the liability of the defendants on the contract of sale. They further contended that, apart from the question of the collateral oral agreement, the plaintiff had not accepted the repudiation by the defendants of the contract of sale, but had elected to treat the contract as a good and subsisting contract by tendering the bills of lading and the consignments of rosewood as they arrived; that he was bound to tender rosewood answering the description of the rosewood in the contract, and that the defendants were therefore not bound to accept the rosewood ex *Spheroid*, a considerable portion of which did not answer the description of the rosewood contracted to be sold.

The learned judge found that no such oral agreement as that relied upon by the defendants had been entered into between the parties; he further found that the repudiation of the contract by the defendants was wrongful, and that it was accepted by the plaintiff as a final repudiation. But he also found that a portion of the consignment of rosewood ex

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Spheroid was not in accordance with the contract, and that this inferiority was such as would have entitled the defendants to repudiate the whole of that consignment had they not previously wrongfully repudiated the whole contract of sale; under which circumstances they were only entitled to give evidence of inferior quality in reduction of damages. He therefore allowed a deduction in respect of the inferior quality, and gave judgment in favour of the plaintiff.

The defendants appealed.

J. A. Hamilton, K.C., and *J. D. Crawford*, for the defendants. The defendants are not liable to damages in respect of the first consignment. It is not sought to impugn the finding of the learned judge that the collateral oral contract relied on by the defendants did not in fact exist. That being so, it is not disputed that there must be a judgment against the defendants for some damages; but it is contended that they are not liable to pay damages to the amount found by the learned judge. Where there has been what has been sometimes called an anticipatory breach of contract by repudiation of the contract by one of the parties before the time fixed for performance, the other party may treat that repudiation as a definitive breach of the contract, a wrongful rescission of it, and may sue upon it accordingly; but if he does not take that course and, when the time for performance of the contract arrives, treats the contract as still subsisting, then he keeps the contract open for the benefit of both parties. The plaintiff might have sued as upon a breach of the contract when the defendants in the first instance repudiated the contract, but he did not elect to do so, and subsequently he tendered the bill of lading for the first shipment to the defendants, thus clearly treating the contract as still subsisting. That being so, before he can recover damages for the refusal of the defendants to accept the first shipment of wood, he must shew that he had fulfilled all conditions precedent on his part. It is submitted that, upon the evidence, it was shewn that that shipment was not according to the contract, and that the defendants were entitled to reject it on that ground. If that be so, then the plaintiff is not entitled

to recover any damages in respect of that shipment. The learned judge has allowed a certain amount in reduction of damages in respect of inferiority of a portion of the wood; but the evidence shews a substantial proportion of the shipment not to have been of the description contracted for, and the purchaser is not bound in such a case to sort out the good from the bad. It is admitted by the defendants that they were bound to accept the second shipment of wood as being in accordance with the contract, and they therefore cannot complain of the judgment so far as that shipment is concerned.

[MATHEW L.J. By this contract cash was to be payable against bill of lading. The bill of lading, and with it the right to the goods, may be transferred from one person to another before the shipment arrives. It is difficult as a matter of business to reconcile that with the right to reject the goods on the ground of mere defective quality of some pieces of wood.]

The payment of the price against the bill of lading does not prevent rejection of the goods, if they are not of the kind contracted for, and in that case the price paid may be recovered back. It may be that, in order that there may be a right of rejection, there must be such a difference between the goods tendered and those contracted for as to amount to a breach of a condition as distinguished from mere breach of a collateral warranty; but it is contended that the evidence in the present case shews such a difference in the case of the first shipment, there being in it a large number of pieces of wood not of the quality described as the subject-matter of the contract.

Scrutton, K.C., and *J. R. Atkin*, for the plaintiff. The judgment was right, and should be affirmed. The defendants, while the first consignment was still at sea, repudiated the entire contract upon a ground which had nothing to do with the character of the goods themselves, and which the learned judge has found to be in fact a bad ground; the repudiation was therefore wrongful, and that original repudiation was never retracted by the defendants; it was, on the contrary, always insisted upon by them. The absolute repudiation of the contract by the defendants forms in itself the clearest evidence that they waived the performance of conditions precedent

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by the plaintiff. The effect of the repudiation and of the waiver of conditions precedent is that the plaintiff need not prove, as to the first shipment, that he ever tendered it to the defendants, or that he sent on the bill of lading to them, or indeed that there was any rosewood in existence for delivery under the contract. Not only did the defendants repudiate the contract while the first consignment was still at sea, but the evidence shews that they refused both the first and second consignments on the same ground, that there had been a breach by the plaintiff of the suggested collateral agreement which entitled the defendants to repudiate the whole contract and to reject any consignment offered for delivery under it. The defendants are really endeavouring to contend that a continuing repudiation of a contract has the effect of reviving conditions precedent the performance of which they have already waived by their original repudiation. Apart from the question of repudiation of the contract by the defendants upon an untenable ground, their remedy, where a part of the consignment tendered is not in accordance with the description, but the fault is not such as to affect the commercial and merchantable quality of the whole parcel, is by a claim for damages and not by rejecting the entire consignment, and the evidence shews that 5 to 6 per cent. on the price would be an ample allowance in respect of the first consignment.

[They cited *Honck* v. *Muller* (1); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2); *Vigers* v. *Sanderson.* (3)]

J. A. Hamilton, K.C., in reply.

COLLINS M.R. In this appeal the amount at stake is small, but the principles of law involved are of some nicety and importance. The question arises thus. The plaintiff, who was the owner of a quantity of rosewood growing in British Honduras, made a contract with the defendants for the sale to them of 100 tons of rosewood answering to a particular description in the contract. The defendants were in the first instance desirous that the rosewood should be sent to them in

(1) (1881) 7 Q. B. D. 92. (2) (1884) 9 App. Cas. 434.
(3) [1901] 1 K. B. 608.

small instalments of about twenty-five tons each; they did not, in fact, want quite so much as 100 tons, but the vendor would not sell less than that quantity, and wanted to sell it in one block; in the end, however, it was arranged that it should be sent in instalments, the size of which was not definitely ascertained or fixed, to be spread over the year 1903. About or shortly before the time when the first consignment was sent, the plaintiff sold and sent a consignment of rosewood to a competitor of the defendants in their trade: at this the defendants were annoyed, considering it to be a breach of a fundamental stipulation, to which they asserted that the plaintiff had agreed, not to deliver rosewood during 1903 to any one but themselves; they therefore wrote to the plaintiff or his agent repudiating all obligation on their part to take any rosewood under their contract with the plaintiff. The terms of the letter of repudiation written by the defendants were unquestionably absolute, and extended to the entire quantity of rosewood comprised in the contract. When that letter was received the first consignment of rosewood was actually upon the seas, and the bill of lading had been sent to the plaintiff's agents in England, who informed the defendants that they were ready to hand it over to them in exchange for cash as provided by the contract. In their reply the defendants adhered to their general repudiation, which involved the refusal to accept the particular consignment, and refused to pay. The consignment, amounting to about sixty-three tons, came forward, and in view of the refusal of the defendants to accept it or pay for it, it was consigned to brokers in London for sale on the best terms possible. Of that consignment of sixty-three tons which had arrived by the *Spheroid* about seventeen tons was not in accordance with the contract in respect of quality. Later on the plaintiff shipped the balance of the rosewood, and as to that consignment no question now arises; it is admitted that it was in conformity with the contract, and there is no defence to the plaintiff's claim in respect of it. At the trial Kennedy J. found as a fact that the alleged fundamental stipulation as to not selling rosewood to other customers than the defendants had not been made; therefore

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the ground upon which the defendants claimed the right to repudiate the whole contract failed, and they were liable to the plaintiff for breach of the contract. There is therefore no answer to the plaintiff's claim in respect of the second consignment.

I now come to the point as regards the first consignment which has been the subject of such keen discussion. The defendants contend that the true measure of damages is not the difference in market price of the whole of the rosewood comprised in the contract upon the footing that it was all of marketable quality, inasmuch as it was admitted that in some respects the quality of a portion of the first consignment was inferior to that stipulated for in the contract; at the trial Kennedy J., in assessing the damages, gave effect to this contention based on inferiority of quality, but the defendants contend that the allowance made by him was insufficient. They say that upon the repudiation of the contract the plaintiff had two courses open to him. In the first place, he might have accepted the repudiation as absolving him as well as the defendants from the performance of the contract, and as giving him a right once for all to damages for a breach of the entire contract; or, in the second place, the plaintiff might have adhered to the contract, and from time to time have gone into the market when the instalments of rosewood arrived and the defendants refused to accept them, thus keeping open the obligation on the plaintiff's part to be ready and willing to perform the conditions of the contract to be performed by him. The defendants, the buyers, say that the plaintiff took the second course—in other words, that instead of accepting the defendants' repudiation of the contract he took it upon himself to keep the contract alive, and that he must therefore shew that he was ready and willing to carry out his part of the contract when the time came to tender each instalment. They further say that the first instalment was not such as they were bound to accept, because a considerable percentage of it did not conform to the standard of quality prescribed by the contract, and they pray in aid the observation of Kennedy J. that, if it had been necessary to tender that consignment formally, the buyers, that is the defendants, would have been entitled to reject the whole of it.

The defendants further contend that, if the learned judge was right in his view, the buyers would have been entitled to refuse to accept the instalment on the ground of difference in quality, that instalment must, for the purpose of assessing the damages, be wholly wiped out, because the plaintiff, not being able to shew that he was himself able and ready and willing to fulfil his part of the contract according to its terms, could be entitled to no damages in respect of that instalment; and that the question of damages was thus narrowed down to the damages in respect of the second instalment.

At first sight this contention of the defendants seems to be a formidable one, but upon a more careful analysis I think it is untenable. We must for this purpose deal with the contract upon the footing that it was kept alive. The obligation upon the plaintiff was to deliver the rosewood by instalments. Where such an obligation exists, as each instalment is tendered under the contract, the buyer must be ready and willing to perform the contract as well as the seller, and if he is not willing to perform it he may by his conduct or by express words absolve the seller from his obligation. In the present case, after there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment; but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract and refused to be bound by it. In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them. One answer to such a contention on the part of the defendants is that, tested by the old form of pleadings, it would

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have been a good replication by the plaintiff to aver that the defendants had waived performance by him of the conditions precedent by adhering to their original repudiation of the whole contract, and would not accept any instalment if tendered to them. The defendants are not in a position now, by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make. We must in such a case look to see whether, at the time of each alleged breach, each side was ready and willing to perform the conditions of the contract which it lay upon them to perform, and there was clearly a breach by the defendants, for they had by their own act absolved the plaintiff from the performance of the conditions of the contract. In such a case the ordinary rule as to the measure of damages is the proper rule to apply. In the present case it has, I think, been applied, if anything, somewhat too favourably for the defendants. Logically, the damages should, I think, have been assessed upon the footing that the wood which the plaintiff was excused from delivering was up to the standard stipulated for in the contract, though it turns out that it in fact fell slightly short of the monetary value of wood quite up to that standard; but the learned judge has assessed the damages from the point of view of common sense rather than of strict law, and has made an allowance, of which the defendants cannot complain. This really decides the whole case, for there is no dispute as to the second consignment.

The ground on which our judgment proceeds relieves us from considering whether the fact that a portion of the first consignment did not correspond in all respects with the standard stipulated for in the contract would, had it stood alone, have given the defendants the right to reject the whole consignment. The learned judge thought they would have had the right, and, though there was evidence both ways, I should have been loth to differ from a judge of so great experience in this class of case had it been necessary to decide it. The appeal must, therefore, be dismissed.

MATHEW L.J. I am of the same opinion. In order to ascertain the intention of the parties, we must consider what would

have been the position if the terms of the contract had been strictly fulfilled. There was a contract for the sale of a certain quantity of merchantable wood from Honduras; the bill of lading came forward, and the defendants could have produced their cheque and taken the bill, when the property would have passed to them at once by the indorsement of the bill of lading; under no circumstances could the defendants have declined to accept a bill of lading tendered to them in the ordinary course. If the defendants had subsequently discovered that the wood did not come within the exact description of the wood stipulated for in the contract, they could only have recovered back the money already paid by them if the wood answered in no respect to the contract description but was of a different character: this was clearly pointed out by Jervis C.J. in *Wieler* v. *Schilizzi* (1) in his direction to the jury, which was upheld by the Court of Common Pleas. In the present case there was, in my opinion, abundant evidence to shew that the first consignment was sound and was merchantable as rosewood, and would have been properly described as rosewood in the trade, though it would have been subject, as regards a portion of the consignment, to a small reduction in price. It is impossible to expect perfect performance of such a contract, and where such a small quantity as 5 or 6 per cent. fails to answer the description a reduction of price is the reasonable and business-like mode of determining the dispute. That would be the state of things in the case of a simple contract for the sale of rosewood.

But in the present case part of the arrangement was that the whole quantity of rosewood bought was split up into different shipments, the first of which was of about sixty-three tons. While this shipment was still afloat and the bill of lading was coming forward but had not yet arrived, the defendants made up their minds to reject the consignment: this they did upon a ground which at the trial they failed to establish; their repudiation was therefore wrongful. Then the bill of lading came forward and was tendered to the defendants in proper form, and it became their duty to take it up and pay for the

(1) (1855) 17 C. B. 619.

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Mathew L.J.

goods, for the defence that they set up that the goods were not merchantable fails them. But they repudiated the whole contract, and by so doing clearly absolved the plaintiff from the performance of conditions precedent which in the ordinary course he would have been obliged to perform. The plaintiff took the only course open to him in selling the wood against the defendants, and that terminated the first part of the contract, which, by reason of the provision for delivering the goods in different shipments, was a severable one. Then the second consignment of wood arrived, and again the defendants refused to accept the bill of lading. Under these circumstances it is to me an astonishing suggestion that the plaintiff is in a difficulty as to the first consignment because he was not in a condition to perform the conditions precedent under the contract, although the performance of those conditions had been waived by the defendants. I have had considerable difficulty in following the argument for the defendants, for it is clear that in a business sense they had no cause of complaint; their contention seems both unbusinesslike and unreasonable and cannot be maintained.

COZENS-HARDY L.J. I agree, for the reasons given by the Master of the Rolls.

Appeal dismissed.

Solicitor for plaintiff: *J. W. Hill, for A. M. Jackson, Hull.*
Solicitors for defendants: *Harcourt, Sons & Rolt.*

W. J. B.

MORAN, GALLOWAY & CO. *v.* UZIELLI AND OTHERS.

1905
March 27.

Insurance, Marine—Insurable Interest—Agents in United Kingdom of Foreign Ship—Advances for Necessaries—Admiralty Court Act, 1840 (3 & 4 *Vict.* c. 65), s. 6.

The plaintiffs, the agents in the United Kingdom of a foreign ship, effected an insurance for a named voyage "on disbursements against the risk of total and constructive total loss of ship only," the perils insured against including perils of the seas. At the date of the policy the shipowners were indebted to the plaintiffs to a considerable amount for advances for the ship's disbursements, part of which had been made for the purposes of the particular voyage and part at prior dates. The ship reached her port of destination in the United Kingdom, but suffered severe damage on the voyage from perils of the seas, and, the estimated cost of repair exceeding her estimated value if and when repaired, it was admitted that she was a constructive total loss within the meaning of the policy. The freight, which was received and retained by the plaintiffs under their lien, was insufficient to recoup the plaintiffs the amount of their advances, and the plaintiffs, who had no lien upon the ship, brought an action on the policy of insurance to recover the balance of their advances:—

Held, that the plaintiffs, having a right under s. 6 of the Admiralty Court Act, 1840, to enforce their claim for advances, so far as they were in respect of necessaries supplied to the ship, by an action in rem, and for that purpose to arrest the ship, had an insurable interest in the ship to the extent of the unsatisfied balance of those advances.

ACTION upon a policy of marine insurance tried before Walton J. at the Liverpool Assizes.

At the trial it was contended (inter alia) by the defendants that the plaintiffs had no insurable interest in the subject-matter of the insurance and could not recover upon the policy. After full argument at Liverpool judgment was reserved, and was ultimately delivered without further argument in London. (1)

The facts and arguments are set out at length in the judgment.

Pickford, K.C., and *G. D. Keogh*, for the plaintiffs.

Carver, K.C., and *Llewellyn Davies*, for the defendants.

(1) In view of the general interest of this decision, it is thought desirable to depart from the established practice of not reporting cases in which the arguments have been concluded on Circuit.

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March 27. The following written judgment was delivered by

WALTON J. In this case the plaintiffs' claim is under a marine policy dated June 2, 1902, subscribed by the defendants for a sum of 500*l*. The terms of the policy in so far as they are material for the purposes of this case are as follows: "Be it known that Moran, Galloway & Co., as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may (or) shall appertain in part (or) in all do make assurance and cause themselves and them and every of them to be insured lost or not lost at and from Vancouver and (or) Puget Sound to any ports and (or) places in the United Kingdom and for 30 days in port after arrival however employed upon any kind of goods and merchandises and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Prince Louis*, the said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at"—that is printed; then these words are written: "On disbursements against the risk of total and constructive total loss of ship only." The perils insured against included perils of the seas.

The *Prince Louis* was a foreign ship, which at the date of the policy and at the time of her constructive total loss belonged to a company which, as I understand, was a foreign single-ship company, though my judgment does not depend upon this latter assumption. The plaintiffs were the agents for the ship in this country. Some of the members of the firm own shares in the company which was the owner of the *Prince Louis*, but it was not contended that this was material for the purposes of this case. The plaintiffs, as ship's agents, had during the years 1900, 1901, and 1902 made advances for the ship's disbursements, and at the date of the policy and of the alleged loss the shipowners were indebted to them in a considerable amount on account of such advances. Some of the advances were made for the purposes of the voyage covered by the policy, but a large part of the advances had been made before the commencement of such voyage, and for other

purposes. The defendants have admitted that the advances were in fact made, and were made for the purposes mentioned in the plaintiffs' account. The question arose at the trial whether the advances were necessaries within the meaning of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6, and whether at the date of the policy and the loss the plaintiffs were entitled to recover the amount owing to them on account of such advances by an action in rem in the Admiralty Division. (1) This question was reserved. For the purposes of this judgment I assume that at the date of the policy and of the loss the owners of the *Prince Louis* were, and still are, indebted to the plaintiffs, first on account of disbursements, and secondly on account of disbursements which were for "necessaries" within the meaning of 3 & 4 Vict. c. 65, s. 6.

The *Prince Louis* loaded under charter a cargo of timber at Vancouver in April, 1902. She sailed with such cargo on the insured voyage on May 1. She arrived in Cardiff Roads on November 24, and docked for discharge on November 25. Her cargo was all discharged by December 18, and the freight thereon was earned and paid to the plaintiffs as agents for the owners of the ship. She moved to another berth to receive stiffening and a cargo of coals under a fresh charter, and received her stiffening on December 20. The loading was not proceeded with because it was discovered that she was damaged, and by two survey reports, dated respectively January 12 and January 23, 1903, and a specification, dated January 24, 1903, it was found that the cost of repairing her would exceed the value of the ship when repaired. The condition of the ship, as found by such surveys, was due to straining in bad weather and perils of the sea between May 1

(1) By the Admiralty Court Act, 1840, s. 6, "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received or necessaries furnished, in respect of which such claim is made."

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and November 24, 1902. It was admitted that the ship did become a constructive total loss in consequence of damage which she received at sea during the voyage in question. It was admitted that the plaintiffs were entitled to collect the freight, and had a lien upon it for the amount owing to them for advances. The plaintiffs received and retained the freight, and placed it to the credit of their account against the shipowners. The plaintiffs had no lien or charge of any kind upon the ship.

The defendants admit that the plaintiffs had an insurable interest in disbursements in so far as there was a lien for them upon the freight, but no further; they admit that such interest was insured by the policy, but say that, inasmuch as the freight was received by the plaintiffs, there was no loss. The plaintiffs contend that independently of their lien upon the freight they had an insurable interest to an amount equal to the value of the ship in respect of what was owing to them for disbursements, whether secured by any charge or lien on the ship or not; that such interest was insured by the policy, and inasmuch as there is still a considerable sum owing to them after giving credit for the freight received, they have suffered a loss in respect of which they are entitled to be indemnified under the policy.

Before proceeding further, I may point out that, in the case of an ordinary shipowner's policy on disbursements, no questions arise such as have to be considered in the present case. In such cases the disbursements represent expenditure by the shipowner either on his ship or for the purpose of earning his freight, and such policies are in the nature of insurances of the shipowner, either upon his ship or upon his freight. And even in cases of insurances effected after the Admiralty Court Act, 1840, and before the decision of the Court of Appeal in *The Heinrich Björn* (1), by the ship's agents as in the present case on disbursements for necessaries supplied to a ship, it was not likely that any such question as I have now to consider would arise. For it was commonly supposed before the decision in *The Heinrich Björn* (1) that the Admiralty Court Act, 1840,

(1) (1885) 10 P. D. 44.

had given a maritime lien for necessaries. See, for instance, Williams and Bruce's Admiralty Practice, 2nd ed. (1886), p. 183; and if there was a maritime lien there was an insurable interest. Since *The Heinrich Björn* (1), decided in 1885, the question which I have now to decide has not, so far as I know, been considered or decided in any case which has come before our Courts. This, however, may be to some extent due to what I believe is a common practice of insuring disbursements under "honour" policies upon which no action can be brought.

The question which has to be determined in this action is whether the plaintiffs have lost by perils of the seas anything in which they had at the time of loss an insurable interest, and, if so, what was the amount of such loss. In the first place, it is convenient to consider whether the plaintiffs had any insurable interest. In dealing with this question, a further question sometimes arises whether the interest of the assured was sufficiently described in the policy; but no such question arises in the present case. The plaintiffs' interest was in respect of their advances, and it has been admitted that such interest is sufficiently described in the policy as "disbursements"; and this description is perhaps a little amplified by the words which follow—that is to say, "against the risk of total and constructive total loss of ship only." I may add that this admission which was made before me in chambers did not involve an admission that the plaintiffs had an insurable interest. What, then, was the plaintiffs' interest? They clearly had an interest in the debt which was due to them on account of their disbursements, or, in other words, in their legal right as creditors of the shipowners. But this legal right was in no sense dependent on the safe arrival of the ship. It remained the same whether the ship was lost or not. It was not, and was not capable of being, exposed to the perils insured against. It was never at risk under the policy. It was not lost. As was said by the Court in *Stainbank* v. *Fenning* (2), "A mere debt . . . . for repairs and disbursements could not legally be made the subject of an insurance." I think, therefore,

(1) 10 P. D. 44. (2) (1851) 11 C. B. 51, at p. 89.

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that the fact that the plaintiffs were interested in the debt merely as a debt did not give them any insurable interest. What other interest in respect of their disbursements had the plaintiffs? They had a charge or lien on the freight; but this they have not lost; on the contrary, it has been fully satisfied. The plaintiffs, however, contend that they had an interest, not merely in freight, but in the ship itself as the practical security for the payment of what was owing to them by the shipowners. They say that the ship was, after the freight was exhausted, if not the only, at all events the principal, asset of the shipowners, and that the recovery of the debt owing to the plaintiffs for their advances was in fact dependent on the safe arrival of the ship. There was no evidence before me to shew that the debt may not still be recoverable from the shipowners. The plaintiffs' case in this respect cannot be put higher, I think, than this, that the recovery of the debt was rendered less certain and more difficult by the loss of the ship. Assuming that in this sense the recovery of the amount due for disbursements was dependent on the safe arrival of this ship, did this give to the plaintiffs, who had no charge or lien of any kind on the ship at the time of the loss, an insurable interest under the policy? As was explained by Lawrence J. in the opinion delivered by him in the House of Lords in *Lucena* v. *Crauford* (1), an interest which is not in the nature of a property legal or equitable in the things exposed to maritime perils may still be insurable. "Where," says the learned judge, "a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction." He then proceeds to shew that it is no valid objection to these propositions that the interest is liable to be affected by other matters than the perils insured against, and he sums up his opinion on the question in these words (2):

(1) (1806) 2 B. & P. (N.R.) 269, at p. 302; 6 R. R. 623, at p. 686.

(2) 2 B. & P. (N.R.) at pp. 303-4; 6 R. R. at pp. 687-8.

"It seems to me that the contract of marine insurance may extend to protect every kind of interest that may subsist in or be dependent upon things exposed to the dangers to which maritime adventures are subjected; and I am not aware that by the laws of this country it has been reduced within narrower limits."

It is unnecessary to cite cases to shew that this opinion of Lawrence J. has always been accepted as a correct statement of the law. If it stood alone and without further explanation, it seems to me that the plaintiffs might have good grounds for contending that, as creditors of a single-ship company, they had an interest dependent on the safety of the company's ship—an interest just as insurable as the interest of a creditor in the life of his debtor. But I think that in the latter part of the same opinion Lawrence J. himself indicates clearly that the words "interest dependent upon things exposed to the dangers to which maritime adventures are subjected" require further definition. In *Lucena* v. *Craufurd* (1) the assured were commissioners, whose duty it was under a statutory commission to take charge of Dutch vessels and cargoes "which had been or might be thereafter detained in or brought into the ports of the United Kingdom." Before the commission was issued, certain Dutch vessels and their cargoes had been seized by order of the British Government for the purpose of being brought to this country. After the commission was issued, the commissioners insured these ships and their cargoes. The ships with their cargoes were lost before arrival in this country, and the commissioners brought an action upon the policy. Under these circumstances Lawrence J., after stating the general principles in the words which I have read, expressed his opinion that, as the purpose and object of the commission was only to take care of the Dutch property after its arrival in England, and the commissioners till then had not any power to interfere with it, and could not in their character of commissioners suffer any damage by a loss happening before they had any concern in the ships or goods, they could not be said at the time of the loss to have had any insurable interest.

(1) 2 B. & P. (N.R.) 269; 6 R. R. 623.

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The same view was adopted by Lord Eldon, Lord Erskine, and apparently by Lord Ellenborough, the noble Lords who heard the appeal. In the words of Lord Eldon (1): "That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favour of the expectation." Without citing later cases, it is sufficient to say that, in my opinion, the result of the authorities is that, although an interest to be insurable is not necessarily a right, legal or equitable, in or charge upon or arising out of the ownership of the thing exposed to the risks insured against, and any interest may be insured which is dependent on the safety of the thing exposed to such risks, still it must in all cases at the time of the loss be an interest legal or equitable, and not merely an expectation, however probable.

In so far as the plaintiffs' claim depends upon the fact that they were ordinary unsecured creditors of the shipowners for an ordinary unsecured debt, I am satisfied that it must fail. The probability that if the debtor's ship should be lost he would be less able to pay his debts does not, in my judgment, give to the creditor any interest, legal or equitable, which is dependent upon the safe arrival of the ship. In such a case all that the creditor has, all that he can lose by the loss of the ship, is an expectation. I do not think that the creditor of a shipowner has an insurable interest in all the shipowner's property which is exposed to maritime risks. This appears to me to be assumed by the Court in the case of *Stainbank* v. *Fenning* (2), which I have already cited; and as far back as in the second edition of Arnould on Marine Insurance, published in 1857, at p. 329, I find an American case cited, apparently with approval, in which it was decided that "advances for repair of ship give no insurable interest in the ship unless when secured by a lien by law or contract."

But a further, and to my mind much more difficult, point remains to be considered. It is said that the plaintiffs in the present case had more than an expectation, because they had the right under the Admiralty Court Act, 1840, to proceed in

(1) 2 B. & P. (N.R.) 269, at p. 323; 6 R. R. 623, at p. 704. (2) 11 C. B. 51.

rem for the recovery of the amount owing to them. I assume, for the purposes of this judgment, that the disbursements in question were made for necessaries within the meaning of the Act. At the date of the policy and at the date of the loss the position of the plaintiffs was this. They had advanced moneys for the necessaries of the *Prince Louis*. The ship was at sea on her voyage to Cardiff. The plaintiffs had a then existing right which would entitle them immediately after the arrival of the ship at Cardiff to arrest her under process; and by so doing, in the language of Dr. Lushington in *The Volant* (1), cited by Fry L.J. in delivering the judgment of the Court of Appeal in *The Heinrich Björn* (2), to obtain "security for prompt and immediate payment." If the ship was lost, the right to obtain this security on the *Prince Louis* was gone. Was this a real risk which underwriters may be asked, in consideration of an adequate premium, to undertake? And if they do undertake it, is the contract a binding contract? There is no doubt, to my mind, as to the reality of the risk. The foundation of the rules as to insurable interest is that the contract of marine insurance is essentially a contract of indemnity. Unless the assured is exposed to a risk of real loss by the perils insured against, the contract is not a contract of indemnity, but is a mere wagering contract, and cannot be enforced. I am satisfied that a contract such as I have indicated, and such as is contained in the policy now in question (in so far as it extends to cover the plaintiffs' interest in respect of necessaries), is not a wagering contract, and is a contract by which the plaintiffs were protected from the risk of a real loss. I agree with what is said by the authors of the Digest of the Law of Marine Insurance, Mr. Chalmers and Mr. Owen, at p. 9 of the edition of 1901, and I borrow their language: "The definition of insurable interest has been continuously expanding, and dicta in some of the older cases, which would tend to narrow it, must be accepted with caution." I fully appreciate the argument founded upon the decision of the Court of Appeal in *The Heinrich Björn* (2); but this decision comes only to this, that there is no maritime lien, no

(1) (1842) 1 Wm. Rob. 383, at p. 387. (2) 10 P. D. 44, at p. 54.

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charge upon the ship for necessaries. But there may, as I have shewn, be an insurable interest without any such charge or lien. It is no sound answer to the plaintiffs' contention upon this point to say that the plaintiffs' right to obtain a security on the ship might be defeated by perils other than those insured against. This difficulty is dealt with by Lawrence J. in *Lucena* v. *Craufurd*. (1) I think there is a distinction between the position of a creditor for an ordinary debt who has no right to arrest the property of his debtor except after judgment, under a writ of execution, and the position of the plaintiffs in this case. To hold that there was an insurable interest in this case will not offend against the principle of the rules as to insurable interest, or against any decision of our Courts. To hold that there was no insurable interest would, I think, be to impose an unnecessary fetter upon business which seems to me very ordinary and reasonable business, in no way tainted by the vice of wagering or gaming. Therefore I hold that, to the extent to which the plaintiffs' claim for disbursements was a claim for necessaries within 3 & 4 Vict. c. 65, s. 6, they had an insurable interest. There remains the question whether there was any and what loss, and that may involve an investigation of facts, and further argument on questions of law. Those questions are still open.

Judgment for the plaintiffs on the question of insurable interest.

Solicitors for plaintiffs: *Walker, Son & Field, for Weightman, Pedder & Weightman, Liverpool.*

Solicitors for defendants: *Parker, Garrett, Holman & Howden.*

(1) 2 B. & P. (N.R.) 269, at p. 303; 6 R. R. 623, at p. 687.

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Burial—Burial Authority—Cemetery—Rights of Incumbent of Parish—Burial — Fees—Interment of Nonconformist without Rites of Church of England—Consecration of part of Cemetery—Absence of Sanction of Secretary of State to Consecration—Burial Act, 1852 (15 & 16 *Vict. c.* 85), *s.* 32—*Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *s.* 7—*Burial Act*, 1900 (63 & 64 *Vict. c.* 15), *s.* 3.

A burial authority which had acquired land for a new cemetery petitioned the Secretary of State, under s. 7 of the Burial Act, 1853, for his sanction to the division of the ground into four approximately equal parts, of which one part (called plot A) was to be consecrated; the sanction was duly given. Subsequently a petition was presented on behalf of the burial board to the bishop of the diocese, praying for the consecration of plots A and C: the latter was apparently inserted in error. Both plots were duly consecrated, all the legal requirements and formalities as to the consecration being complied with. In 1904 two burials took place in plot C of two Nonconformist residents, who were buried with the rites of the respective communities to which they belonged, and without any of the rites and ceremonies of the Church of England; no services were rendered by the vicar of the parish or by any one on his behalf in respect of these burials. The vicar having sued the burial authority to recover a fee of 2*s.* 6*d.* in respect of each of these burials:—

Held, first, that plot C, having once been consecrated with the proper legal formalities, remained consecrated ground, notwithstanding the want of the sanction of the Secretary of State to its consecration; but, secondly, that the vicar, having rendered no services in respect of the burials, was not entitled under s. 3, sub-s. 4, of the Burial Act, 1900, to any fees in respect of them.

APPEAL of the defendants from a decision of the judge of the Neath County Court.

The action was brought by the vicar of Briton Ferry against the defendants, who were the burial authority for that parish, to recover fees in respect of interments in a certain portion of the cemetery under the following circumstances.

In the year 1878 the Briton Ferry Local Board became the burial board for the parish of Briton Ferry, and negotiations were shortly afterwards entered into by them for the acquisition of a piece of land for a new cemetery. The requisite land was obtained, and was eventually laid out in four approximately equal portions—A, B, C, and D. In June, 1879, the board

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resolved to petition the Secretary of State for his sanction, which was requisite under s. 7 of the Burial Act, 1853, to the division of the cemetery into four plots, of which plot A was to be consecrated for the purpose of burials in accordance with the rites of the Church of England. On September 15, 1879, the Home Secretary gave his sanction to the proposed division and to the setting apart of plot A for the purpose of consecration. On July 13, 1882, the bishop performed the office of consecration, and consecrated both plots A and C in accordance with what was supposed to have been the Home Secretary's sanction, and at the trial evidence was given which shewed that a petition bearing the seal of the board and signed by the clerk of the board, though not by the members of the board, had been presented to the bishop asking him to consecrate 2½ acres, which was the combined acreage of the two plots, while on the plan attached to it the two plots were coloured as the part to be consecrated. It was in connection with plot C that the present question arose.

For some years plot C was not used for interments, the first burial in it being in 1886, when a Nonconformist minister was buried with the rites of his own community. No clergyman of the Established Church took part in the ceremony, no notices were given under the Burial Act, 1880 (43 & 44 Vict. c. 41), and the fees charged were the fees properly chargeable in respect of a burial in unconsecrated ground. Down to the year 1902, when the late vicar of Briton Ferry died, there were in all thirty-three burials in C, all of which were burials of Nonconformists under precisely similar circumstances. No fees were demanded by, or paid to, the late vicar in respect of any of these burials.

In 1902 the late vicar of Briton Ferry, who had expressed a wish to be buried in the churchyard of his parish church, with which it was found impossible to comply, was buried in plot C with the rites and ceremonies of the Church of England.

On July 19 and August 13, 1904, occurred the two burials in plot C in respect of which the fees were claimed in the present action; both were burials of Nonconformists under precisely similar circumstances to those existing in the thirty-three

instances before mentioned. No fee for the vicar was collected by the defendants in respect of these two burials, the only fees that, in accordance with the table of fees, they believed they had the power to collect being paid in each case by them to the officiating minister.

The county court judge dealt with no other question than that of the consecration of plot C, and on the ground that that plot of ground had been duly consecrated gave judgment for the plaintiff.

The defendants appealed.

S. T. Evans, K.C. (*John Sankey* with him), for the defendants. There are two main objections to the plaintiff's right to recover these fees: first, the plot in which the burials in question took place was not consecrated ground; and, secondly, the effect of the legislation on the subject is that, subject to certain reservations as to vested rights, of which the present case is not one, the incumbent has a right to fees only in respect of services rendered. The Burial Act, 1852, which dealt only with the metropolis, gave power to the burial boards created by that Act to appropriate ground for the purpose of a cemetery, and to apportion it into consecrated and unconsecrated ground; and s. 32 provided that the incumbent or minister of the parish should by himself or an authorized deputy perform the duties and have the same rights and authorities for the performance of religious service in the burial in a burial ground, or the consecrated portion thereof, and should be entitled to receive the same fees in respect of such burials, as he had previously enjoyed and received.

That section must mean that the incumbent's right to fees in respect of burials only arises where he performs the service, and it is submitted that it refers only to burials in consecrated ground. By s. 7 of the Burial Act, 1853, most of the provisions of the Act of 1852, including s. 32, were extended to parishes not in the metropolis, and by the proviso to s. 7 it was enacted that new burial grounds "shall be divided into consecrated and unconsecrated parts in such proportions, and the unconsecrated part thereof shall be allotted in such manner

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and in such portions as may be sanctioned by one of Her Majesty's principal Secretaries of State." The effect of that proviso is that no ceremony of consecration can avail at all unless the consecration of the particular portion of the cemetery has been sanctioned by the Secretary of State.

Under the Burial Act, 1880, better known as Osborne Morgan's Act, forty-eight hours' notice must be given to the incumbent by a relative, friend, or legal representative, having the charge of and being responsible for the burial, that it is intended that a deceased person shall be buried in the churchyard or graveyard of the parish without the rites of the Church of England, and the word "graveyard" is defined as including any burial ground or cemetery provided by any burial board. The burials in question did not, however, take place under that Act, which has no application to the present case; had they been under the Act, a question might perhaps have arisen as to the plaintiff's right to these fees. Lastly comes the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3 of which deals at length with the question of fees, and under that section the plaintiff's claim must, if at all, be justified. The effect of sub-ss. 1–3 is that the Secretary of State may approve a table of fees to be received by the burial authority in respect of services rendered by any minister of religion, and the fees, which are to be the same in respect of burials in the consecrated and unconsecrated parts of a burial ground, are to be collected by the burial authority (with any other fees payable to them) and paid by them to the minister. The proper construction of those subsections is that the minister's fees (to whatever denomination he belongs) are only to be paid over to him by the burial board after they have themselves received them. And sub-s. 4 of sub-s. 3 deals only with fees other than for services rendered, such as fees in respect of rights of exclusive burial, erection of monuments, &c. The policy of the Act of 1900 was that no distinction was to be drawn between the members of different denominations, and that no minister of any denomination was to receive any fees under that Act except the one actually performing the ceremony. The incumbent is only entitled to fees for services rendered in connection with the burial; this

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was so under s. 32 of the Act of 1852: *Wood* v. *Headingley Burial Board* (1), and is the policy of all the Burial Acts except Osborne Morgan's Act, which does not apply to the present case. The defendants had no power to collect any fees for any minister except the fee allowed for the officiating minister by the Secretary of State.

Meager, for the plaintiff. The important question which the action was brought to determine is whether the plot in question is consecrated ground. It is submitted that it is. If the ecclesiastical ceremony of consecration has once been carried out in accordance with all the legal requirements, the ground has been consecrated for all purposes; it is impossible to draw a distinction between its being consecrated for the purpose of being used for interments in accordance with the rites of the Church of England and its being consecrated so as to enable the incumbent to recover fees in respect of its use for interments. The principle that ground once consecrated must remain so is insisted upon in the plainest terms in *Reg.* v. *Twiss* (2) by Cockburn C.J., who says: "I do not hesitate to express a very decided opinion that the doctrine laid down by Dr. Lushington is perfectly correct, that when ground is once consecrated and dedicated to sacred purposes, no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character." That is the question which was really fought between the parties, and was the only point on which judgment was given by the county court judge.

[KENNEDY J. Assuming that this portion of the cemetery was consecrated for all purposes, under what statutory provision can the vicar, who has rendered no services in respect of these burials, which it was essential under the Act of 1852 that he should render, recover these fees from the burial board?]

It is submitted that he is entitled to them under the Burial Act, 1900. (3) By s. 5 of the Burial Act, 1880 (Osborne

(1) [1892] 1 Q. B. 713.

(2) (1869) L. R. 4 Q. B. 407, at p. 412.

(3) By the Burial Act, 1900 (63 & 64 Vict. c. 15), s. 3, sub-ss. 1–3, every burial authority is to submit to

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Morgan's Act), a Church of England clergyman is entitled to fees in respect of burials under that Act which are not fees for services rendered. The first proviso of s. 3, sub-s. 4, of the Act of 1900 deals with fees other than for services rendered in respect of any matter arising in a burial ground—an expression clearly applicable to a burial itself; and these fees are to be collected and paid by the burial authority in the same way as fees for services rendered; that proviso applies to fees of the same nature as fees receivable by the incumbent under Osborne Morgan's Act.

[RIDLEY J. It seems clear that s. 3, sub-s. 4, including proviso (i.), applies to things done by the vicar which are not in the nature of services in respect of burials.]

It is submitted that that sub-section gives the incumbent the right to these fees, and that the fees should be collected by the burial board and paid over by them to the plaintiff.

KENNEDY J. I am of opinion that this appeal should be allowed. The claim was by an incumbent for fees in respect of the burial of two persons in a cemetery which is under the control of the defendants, the burial board of Briton Ferry. The burials took place in a part of the cemetery marked C

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the Secretary of State a table of fees to be received by them in respect of services rendered by any minister of religion, and the fees fixed by the table are to be collected by the burial authority and paid by them to the minister.

By s. 3, sub-s. 4, "Subject to the provisions of this section, no fee shall be payable to any incumbent of a parish in respect of any right of exclusive burial, or the erection of a monument, or any other matter whatsoever, in any burial ground maintained by a burial authority, except for services rendered by him .... Provided as follows: (i.) Where, at the passing of this Act, fees other than for services rendered are payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish, and laid out and used before the passing of this Act, the like fees shall continue to be paid during the incumbency of the person who, at the passing of this Act, is the incumbent of the parish, or during a period of fifteen years from the passing of this Act, whichever is longer, or if the fees are not paid to the incumbent, or to any person claiming through or under him, then during the said period of fifteen years, and shall be applicable to the like purposes as heretofore, and the burial authority shall collect and pay these fees in like manner as the fees to be paid for services rendered."

upon the plan, which was a portion of a large piece of land divided into four plots, and given to the district by Lord Jersey for use as a burial ground. The plan was submitted in 1879 to the then Home Secretary for his sanction, which was necessary under s. 7 of the Burial Act, 1853, of an allotment of the ground partly as consecrated, and partly as unconsecrated, ground. The sanction was given to the division into consecrated and unconsecrated portions "as marked on this plan," and the plan clearly shewed it was intended that only the green part, marked A, should be consecrated. But it is a curious fact that in 1882 the defendants themselves, by their clerk, presented a petition for consecration to the bishop of the diocese, in which for some reason or other he was requested to consecrate a portion of the cemetery, which included plot C as well as plot A; in accordance with the prayer of the petition both plots were consecrated in due form. During the incumbency of the late vicar, who died in 1902, there were thirty-three burials in plot C, all these burials being those of persons who were not members of the Church of England, and who were not buried in accordance with the rites of that Church. The next burial was that of the late vicar himself, who was buried there because it was found impossible to comply with his wish to be buried in the churchyard of his own church. No doubt his relations believed that they were burying him where he would have desired to be buried, that is to say, in consecrated ground. I have no doubt that the decision of the learned county court judge as to the effect of consecration was correct, and that this ground must remain consecrated until, as Lord Coleridge C.J. said in *Wood* v. *Headingley Burial Board* (1), there has been some act (if such an act is possible) performed by the proper ecclesiastical authority which would have the effect of annulling the consecration that had been duly performed according to law; until such an event happens, this plot must, from the ecclesiastical point of view, remain consecrated ground. It is none the less consecrated because there has been no compliance with the direction in the proviso to s. 7 of the Burial Act, 1853, as to obtaining the sanction of the Secretary

(1) [1892] 1 Q. B. 713, at p. 725.

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of State to the division of the cemetery into consecrated and unconsecrated ground. It is unnecessary for us to decide and I do not intend to express an opinion whether, by reason of the non-compliance with the statutory provision contained in s. 7 of the Burial Act, 1853, and the want of the prescribed sanction of the Secretary of State, the rights of parties who would otherwise be entitled, in respect of the consecrated ground, to the payment of burial fees are affected in regard to the power of enforcement at law. The county court judge has not expressed an opinion on this point, and in my view the consideration of it is not necessary to the decision of the case.

So far I have dealt with the only point dealt with by the county court judge, and I agree with him that it is impossible to treat this ground as anything but consecrated ground, because the ecclesiastical act of consecration was one to which the sanction of the Secretary of State was not necessary, and if a piece of ground is consecrated according to the law of this realm in the Church of England, it is equally consecrated whether that sanction has been obtained or not. But now we come to the consideration which seems to me fatal to the plaintiff's claim. It seems to be the contention on behalf of the plaintiff that, assuming this to be consecrated ground, the plaintiff is entitled to recover these fees by reason of the provisions of s. 3 of the Burial Act, 1900. I think that that is not so. As I read that section, putting it in its shortest and simplest form, the result is that, subject to certain reservations in favour of vested rights, there is to be no fee except for services rendered. There were matters existing at the passing of that Act in respect of which fees were payable, such as exclusive burial, erection of monuments, &c., and in respect of these, but of these only, there is to be a reservation of rights for the life of the then incumbent or for fifteen years, whichever might be the longer period, but, subject to that, only services rendered are to entitle the incumbent to a fee. The burials in the present case were those of Nonconformists, and were conducted without any service in respect of burial being rendered by the plaintiff. It is clear that they were not burials under circumstances which would entitle the plaintiff to fees

for his services. Nor did they take place under s. 5 of 43 & 44 Vict. c. 41, commonly known as Osborne Morgan's Act. There could be no claim to these fees under that Act. There is, I think, a further ground on which our decision might be based, and that is that, even assuming that in these two cases some fee might be payable although no services were rendered by the incumbent, the claim for such a fee could not upon the evidence before us properly be made against the burial board, whether it might be made against some one else or not. I think, therefore, for the reasons I have given, that this claim cannot be upheld, and that the judgment should be reversed.

RIDLEY J. I am of the same opinion. I agree that this was without doubt consecrated ground. The ceremony of consecration was performed upon it, and not merely were the words of consecration uttered, but the legal act took place which made it consecrated ground; it must remain so. That is in accordance with the view of Lord Coleridge C.J. in the case of *Wood* v. *Headingley Burial Board.* (1)

If that were the only point for us to decide—and it seems to be the only point decided in the Court below—there would be an end of the case; but we cannot let it remain there, for the real question is whether certain fees are recoverable from the defendants, the plaintiff's case being that they are recoverable simply because the ground is consecrated ground. I am unable to come to that conclusion. Under the Act of 1852 burial boards had the power of appropriating ground for the purposes of a cemetery and having it consecrated for the use of members of the Church of England. Under s. 32 of that Act fees were recoverable by the incumbent or minister, who should "perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received." It seems obvious that under that section the

(1) [1892] 1 Q. B. 713.

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Ridley J.

fees recoverable for burials in such portions of the ground as were allotted were to be earned and paid in the same way as former fees and paid to the persons who performed the duties. Even before that statute it seems to have been the law that burial fees were only recoverable by those who performed the duties; and that is clearly the meaning of the statutory enactment. In the present case the plaintiff has performed no services, and it is plain to my mind that he does not come under s. 32 of the Act of 1852; indeed, I think that this was practically admitted by the plaintiff's counsel. I do not treat as an obstacle in the way of the plaintiff the provisions of s. 7 of the Burial Act, 1853, which, besides re-enacting the sections which I have already mentioned and applying them to the country generally as well as to the metropolis, adds a proviso that the new burial ground is to be divided into consecrated and unconsecrated portions in such proportions as may be sanctioned by one of Her Majesty's Secretaries of State. In the present case this sanction was, by mistake or accident, not given to the allotment of this particular plot as part of the consecrated portion of the cemetery, and it may be assumed, though it is unnecessary for us to determine the question, that so far as the recovery of fees is concerned (but only so far) there is no consecrated part of a cemetery unless the allotment of that as a consecrated portion has been sanctioned by the Secretary of State. I do not think it necessary to decide that point, because, wholly apart from it, there is obviously no right in the plaintiff in the present case to recover these fees.

If the plaintiff cannot recover these fees under s. 32 of the Act of 1852—and I have already given my reasons for holding that he cannot—neither can he, for the same reason, recover them under s. 5 of Osborne Morgan's Act. I understand it to be admitted by the plaintiff's counsel that these particular burials did not take place under that Act, and upon being asked under what Act the plaintiff was entitled to recover these fees the answer was that they were claimed under s. 3 of the Burial Act, 1900. No doubt, if that section gives him the right to these fees, the plaintiff would be in a strong position, for there would then only remain the objection alluded to by my brother

Kennedy, that the plaintiff is suing the burial board, who have not received the fees; but I do not think that that section assists the plaintiff's contention. The part of the section which has been quoted to us does not, I think, refer to this class of fees at all; it has, I think, relation to fees which are earned for other matters than services rendered. There may be such fees which an incumbent may be entitled to receive in respect of a burial ground analogous to those which he was formerly entitled, and may still be entitled, to receive in respect of a church or churchyard, that is, fees in respect of rights of exclusive burial or the erection of monuments or other matters covered by the language of s. 3 of the Burials Act, 1900—"any other matter whatsoever except for services rendered by him." It is obvious that s. 3, sub-s. 4, refers to these fees, and not to fees earned by services at burials. The proviso upon which the plaintiff's counsel relied turns immediately upon that sub-section, and says, "where at the passing of this Act fees other than for services rendered are payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish"—then follow words giving the incumbent the right to recover them for fifteen years. I think that the language of the proviso was the same as the language of the section which they follow. They do not refer to services in respect of burial at all, but simply to fees which are outside such services rendered and in respect of other matters, and for that reason I think that the plaintiff cannot rely upon that statute. I agree with what my brother Kennedy has said as to the remaining objection, and I think that, although this is undoubtedly consecrated ground, the plaintiff is not entitled to succeed in this action.

Appeal allowed. Leave to appeal.

Solicitor for plaintiff: *C. Valentine Pegge, Neath.*

Solicitor for defendants: *Edmund Hodgkinson, for Alfred Curtis & Son, Neath.*

W. J. B.

1905
May 15, 23.

LEWIS *v.* BAKER.

Landlord and Tenant—Notice to quit—Tenancy at Yearly Rent—Habendum "until such Tenancy shall be determined as hereinafter mentioned"—Provision for Three Months' Notice to quit—Expiration of Notice.

By an agreement of tenancy a public-house was let from a certain date "until such tenancy shall be determined as hereinafter mentioned" at a yearly rent of 70*l.* payable quarterly on certain named days, the tenant agreeing (inter alia) to keep the premises in repair, to obtain the renewal of the licences when necessary, to pay rates and taxes except landlord's property tax, and not to assign or underlet without the landlord's written consent. The agreement contained a provision that it should be lawful for either party to determine the tenancy thereby created by giving to the other three calendar months' notice in writing for that purpose:—

Held, that the agreement created a yearly tenancy determinable only by three months' notice expiring with any year of the tenancy.

ACTION tried by Jelf J. without a jury.

The plaintiff, as assignee of one Thomas Morris, brought this action to recover possession of a public-house. By an agreement of tenancy, dated June 1, 1901, Morris let the public-house in question to the defendant for a term thus expressed in the habendum: "To hold the same unto and by the said John Baker from the 13th day of May last until such tenancy shall be determined as hereinafter mentioned." The rent of 70*l.* was expressed to be a yearly rent, and was to be paid clear of all deductions except for land and property tax by quarterly payments on the 13th day of August, 13th day of November, 13th day of February, and 13th day of May in each year, the first payment to be made on the ensuing 13th August. By the agreement the defendant was to keep the premises, not to assign or underlet without written consent, to keep open the premises at all lawful hours as a licensed house, to apply when necessary for a renewal of the licences, and at the determination deliver up the premises, and the fittings, fixtures, and stock at a valuation. It was further provided that the defendant might be ejected in the event of his being convicted of any offence involving the indorsement of the licence, and

finally it was agreed that either party might determine the tenancy by giving three calendar months' notice in writing for that purpose. On May 11, 1903, Morris, the lessor, gave to the defendant a written notice to quit on August 13, 1903. This notice to quit was not complied with, and subsequently Morris assigned all his interest in the premises to the plaintiff.

J. R. Atkin (*Danckwerts*, *K.C.*, with him), for the plaintiff. Upon the true construction of this agreement it did not create a yearly tenancy, but a tenancy determinable at any time by three months' notice. The effect of introducing the words "until such tenancy shall be determined as hereinafter mentioned" is to fix as the date of determination of the agreement, or terminus ad quem of the tenancy, the day on which a three months' notice to quit, given at any time, shall expire. The case is practically on all-fours with *Doe* d. *King* v. *Grafton*. (1) It is the insertion of these words in the habendum that effectually distinguishes the case from *Dixon* v. *Bradford Coal Supply Society*. (2)

Bankes, *K.C.* (*Kimber*, with him), for the defendant. No doubt under the agreement a three months' notice is sufficient to determine the tenancy, but it must be a notice expiring on the last day of a year of the tenancy just as in ordinary cases a six months' notice would have to expire. The agreement imposes upon the defendant the obligations to repair, to pay rates and taxes, to procure the renewal of licences, &c., which are quite inconsistent with a precarious holding less than a yearly tenancy. *Dixon* v. *Bradford Coal Supply Society* (2) is conclusive in favour of the defendant. [He also cited *Doe* d. *Pitcher* v. *Donovan* (3); *In re Threlfall* (4); *King* v. *Eversfield* (5); *Soames* v. *Nicholson*. (6)]

Cur. adv. vult.

May 23. JELF J. This is an action by the assignee of the reversion to recover possession of a licensed public-house let by one Thomas Morris to the defendant by an agreement in

(1) (1852) 18 Q. B. 496.
(2) [1904] 1 K. B. 444.
(3) (1809) 1 Taunt. 555.
(4) (1880) 16 Ch. D. 274.
(5) [1897] 2 Q. B. 475.
(6) [1902] 1 K. B. 157.

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Jelf J.

writing dated June 1, 1901. The case turns entirely on the question whether a notice dated May 11, 1903, given by Thomas Morris to the defendant to quit the premises on August 13, 1903, was or was not a good notice to terminate the agreement. In order to answer this question I have to determine whether the agreement of June 1, 1901, created, as the plaintiff contends, a tenancy terminable by a three months' notice on either of the four quarterly days mentioned in the agreement, or, as the defendant contends, a yearly tenancy terminable by a three months' notice only at the end of any full year. Every case of an express agreement must be decided on its terms according to the view taken by the Court of the intention of the parties, regard being had to any rules of construction to be gathered from the decided cases.

The principal case relied on for the plaintiff was *Doe* d. *King* v. *Grafton* (1), while for the defendant it was contended that the present case was covered by *Dixon* v. *Bradford Coal Supply Society*. (2) In order to decide which of these contentions is correct, it is necessary to scrutinize carefully the provisions of the agreement of tenancy: it then becomes apparent that the whole difficulty in the present case is caused by the insertion in the habendum of the words "until such tenancy shall be determined as hereinafter mentioned." If these words had been left out, all the other terms of the agreement—the yearly rent payable quarterly in every year, the obligation on the part of the tenant to pay all taxes except property tax, to repair, and to keep up the licences whenever necessary, the right of the landlord to eject the tenant for misconduct, and lastly the clause for determining the "tenancy hereby created" by three months' notice—would point to a yearly tenancy with the one special term of three months instead of the ordinary six months' notice to quit: see *Doe* d. *Pitcher* v. *Donovan*. (3) It is unlikely that such a tenancy should be only intended to last for six months certain and that it might be put an end to on November 13, 1901, before it had lasted a year. But it was contended for the plaintiff that the words "until such tenancy

(1) 18 Q. B. 496. (2) [1904] 1 K. B. 444.
(3) 1 Taunt. 555.

shall be determined as hereinafter mentioned" incorporate by reference the clause as to the three months' notice and form the terminus ad quem, so to speak, of the tenancy, and so bring the case within *Doe* d. *King* v. *Grafton* (1); and no doubt there is much force in this argument, though not so much as if the words "at any time," or similar words, had been added to the notice clause, as was the case in *Soames* v. *Nicholson*. (2) In *Doe* d. *King* v. *Grafton* (1), however, there was no relegation to a later part of the agreement of the clause as to notice, but the terminus was stated definitely in the habendum itself, and several indications of a yearly tenancy present in this case were there absent. *Dixon* v. *Bradford Coal Supply Society* (3), on the other hand, shews the importance of looking to all the terms of the agreement in order to find out (when there is an ambiguity) the intention of the parties, and lays stress on the parts of the agreement which point to a yearly tenancy. On the whole I think that the words "until such tenancy shall be determined as hereinafter mentioned" may fairly be treated as parenthetical, and as having the same kind of effect as the words "terminable however as hereinafter mentioned," which are often to be found in the habendum. The case is not free from doubt, but for the reasons which I have given I am of opinion that the agreement creates a yearly tenancy, and that the notice to quit is bad, and that the defendant is entitled to succeed on that ground.

Judgment for the defendant.

Solicitors for plaintiff: *Simmons & Simmons, for W. J. Shipton, Mountain Ash.*

Solicitors for defendant: *Kimber & Edwards, for J. W. Evans, Aberdare.*

(1) 18 Q. B. 496. (2) [1902] 1 K. B. 157.

(3) [1904] 1 K. B. 444.

W. J. B.

1905
June 27.

FRENCH *v.* HOWIE AND WIFE.

Husband and Wife—Principal and Agent—Goods supplied on Order of Wife—Judgment against Wife for Part of entire Price—Election not to sue Husband for Balance.

An action was brought to recover the balance of an account for groceries supplied by the plaintiff to the defendants, a husband and wife living together, upon the order of the wife. Upon an application under Order XIV. against both defendants the wife admitted her liability to the amount of 4*l.*, and claimed that that was all that was due to the plaintiff. The master accordingly made an order against her for 4*l.*, not in respect of any particular items of the plaintiff's bill, but on account of his claim generally, and he gave both defendants leave to defend for the balance. At the trial the verdict passed for the plaintiff against the husband for the balance claimed, the jury finding that there was no joint liability of husband and wife, but that the husband was solely liable:—

Held (by Lord Alverstone C.J. and Kennedy J., Jelf J. dissenting), that recovery of judgment against the wife for the 4*l.*, although it was part of an entire claim, was not conclusive evidence of an election not to proceed against the husband for the balance, and that the plaintiff was entitled to recover.

Morel Brothers v. *Westmoreland* (*Earl of*), [1904] A. C. 11, distinguished.

APPEAL from the Marylebone County Court.

The action was brought in the High Court to recover a sum of 26*l.* 11*s.* 6*d.* for groceries supplied by the plaintiff to the defendants, a husband and wife living together. The goods were supplied from time to time on the order of the wife. In default of appearance judgment was signed against both defendants. Subsequently the wife admitted her liability to the amount of 24*l.*, claiming that that was all that was due to the plaintiff; and on payment by her of the sum of 20*l.* to the plaintiff's solicitor the judgment was set aside, and leave was given to both defendants to defend for the balance of 6*l.* 11*s.* 6*d.* Subsequently an application was made under Order XIV. against both defendants for that balance, and the master, in view of the wife's admission that she was originally liable for 24*l.*, made an order against her for 4*l.* (1), not in respect of any particular items in the plaintiff's bill, but on account of

(1) This is the 4*l.* mentioned in the head-note as admitted by the wife.

his claim generally; and he gave both defendants leave to defend as to the balance of 2*l.* 11*s.* 6*d.*, and remitted the action to the county court. At the trial the jury found that there was no joint liability of both husband and wife, but that credit was given by the plaintiff to the husband alone, and that the wife had authority to pledge his credit, and judgment was accordingly entered against the husband for 2*l.* 11*s.* 6*d.* The defendant appealed.

Hume-Williams, K.C., and *Trickett*, for the defendant. There having been here, as the jury found, no joint liability on the part of both husband and wife, the plaintiff's claim was an alternative one against one or other of the two defendants. It was open to him to treat the wife as a principal on the ground that she ordered the goods, and claim the money from her, or else to sue the husband as being the real principal. But he could not do both, for the claims would be inconsistent. He was bound to elect between them. And the case of *Morel Brothers* v. *Westmoreland* (*Earl of*) (1) is an express authority that in such a case proceeding to judgment against one of the two defendants is conclusive evidence of an election not to proceed against the other. By accepting judgment against the wife for 4*l.* the plaintiff was estopped from afterwards suing the husband for the balance. The only distinction between *Morel's Case* (1) and the present is that there the judgment signed against the wife was for the whole amount of the claim, here it is only for a part. But that makes no real difference, for the plaintiff's claim here was in respect of an undivided debt, and if either defendant was liable for a part of it that defendant was liable for the whole. The judgment against the wife for the 4*l.* was consistent with both defendants being liable for the whole debt, but was inconsistent with the husband being severally liable for any part of it. And therefore the only issue which was open to the jury to try in the county court was whether there was a joint liability or not. They found there was no joint liability; therefore there ought to have been judgment for the defendant.

(1) [1904] A. C. 11.

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Turrell, for the plaintiff. The case of *Morel Brothers* v. *Westmoreland* (*Earl of*) (1) is distinguishable; it only decides that where the plaintiff has a claim against either of two defendants in the alternative, he by taking judgment against one elects to the extent of that judgment to abandon his remedy against the other. There the judgment was for the whole debt, here only for a part. It was consequently not an election to abandon the remedy against the husband for the balance. The payment by the wife of the 4*l*. was not an admission of her liability for the whole.

Hume-Williams, *K.C.*, in reply. The question is not what the wife admitted, but what the plaintiff's case was. By taking the judgment against the wife he finally elected to say that she was his debtor for the whole amount, either severally or jointly with her husband. If the plaintiff desired to reserve his claim against the husband severally he should have refused the judgment against the wife when it was offered him. He took it at his peril with its concomitant disadvantages.

JELF J. I need hardly say that it is with great diffidence that I differ from my Lord and Kennedy J. in this case, but as I entertain a strong view upon the question I feel bound to state it. It seems to me that the action was one in which, as it turns out, the plaintiff had a right either against the husband or against the wife, but not against both, for the jury have expressly found that there was no joint liability. Then if it is an action in which there is no joint liability, a judgment as it were on the record that the wife is liable for part of the undivided debt sued for, and a judgment that the husband is liable for another part of the same undivided debt, would to my mind be perfectly inconsistent judgments, and a record which set out those two judgments would be self-contradictory. Here, at an early stage of the proceedings, a sum of 20*l*. was paid to the plaintiff's solicitor as a condition of getting a judgment by default set aside. It appears that that 20*l*. was paid by or on behalf of the wife, though I do not know that it is very material whether it was paid by the wife or the husband. It is sufficient

(1) [1904] A. C. 11.

that subsequently a judgment was taken against the wife for 4*l.*, part of the balance of 6*l.* 11*s.* 6*d.*, and the action proceeded to trial in respect of the residue. It seems to me that the only way in which the husband could be held liable on that trial for the 2*l.* 11*s.* 6*d.*, consistently with the judgment that had already been got against the wife for 4*l.*, would be by making out a joint liability of the husband and wife. But that is the very thing that was negatived by the jury. They expressly found that there was no joint liability. And under those circumstances I think the case of *Morel Brothers* v. *Westmoreland* (*Earl of*) (1) is a clear authority that it was too late to make out a several liability against the husband. By accepting a judgment against the wife for a part of an undivided debt he elected to say that she was liable for the whole of it. It can make no difference as to the nature of the election whether the judgment taken was for a part or for the whole; in either case the plaintiff would by taking the judgment have elected to treat her as liable for the whole. And having so elected, he cannot afterwards turn round and say that the husband is severally liable for a part, for the several liabilities of the husband and wife are in the alternative and cannot in the present case co-exist. I am of opinion that the appeal should be allowed.

KENNEDY J. I have great doubt as to the correctness of my opinion in this case, differing as it does from that of Jelf J.; but I cannot bring my mind to believe that the plaintiff has not a right under the verdict of the jury to recover a part of his bill from the husband merely because the master had held in chambers that for another part of it the wife was liable. On the matter coming before the master under Order XIV. he seems to have been satisfied that as regards 4*l.*, beyond the 20*l.* which had already been paid, the wife had no real defence, and he accordingly gave judgment against her for that amount. He further ordered that the remaining 2*l.* 11*s.* 6*d.* should be dealt with by another tribunal, the county court. At the trial the jury found that the liability lay with the husband. It is quite true that in a sense the bill was, as Jelf J. has said, an

(1) [1904] A. C. 11.

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Kennedy J.

indivisible bill—that is to say, it was not a case of portions of the goods being supplied under different circumstances. But although the bill was one, the amounts for which the two judgments were recovered were distinct: no part of the 2*l.* 11*s.* 6*d.* was included in the 4*l.* The case is, in my opinion, not covered by *Morel Brothers* v. *Westmoreland* (*Earl of*). (1) There the two judgments were for the same amount. In the Court of Appeal, Collins M.R. laid stress on that fact (2): "If they choose to take judgment against the wife, they cannot consistently with that have judgment for the *same amount* against the husband . . . . Judgment having been signed against the wife on the footing that she was liable for the price of the goods as a principal, the plaintiffs cannot afterwards obtain judgment for the *same amount* against the husband on the footing that the wife was his agent in ordering the goods." The only election which the plaintiff in the present case made by taking the judgment under Order XIV. was as to the 4*l.*; he never made any election as to the 2*l.* 11*s.* 6*d.*, for the issue as to that sum was not dealt with before the master.

LORD ALVERSTONE C.J. I have the misfortune to differ in this case from my brother Jelf, not so much on the question of the legal principles to be applied as upon the result of their application. The action was brought to recover a sum of 26*l.* 11*s.* 6*d.*, and judgment in default was signed against both defendants. That judgment was set aside and leave given to defend on payment to the plaintiff's solicitor of 20*l.* Subsequently proceedings were taken for the balance of 6*l.* 11*s.* 6*d.* under Order XIV., and the master in chambers made an order that unless the defendant Mary Howie should pay to the plaintiff's solicitor 4*l.* within four days the plaintiff should be at liberty to sign judgment against her for that amount. Default having been made by her, judgment was signed against her for the 4*l.*, and leave was given to both defendants to defend as to the residue of the plaintiff's claim. Under those circumstances it is said on behalf of the defendant William Howie that the acceptance by the plaintiff of that judgment

(1) [1904] A. C. 11. (2) [1903] 1 K. B. 64, at p. 76.

against the wife for 4*l.* was an election which precluded him from proceeding against the husband in respect of a several liability for the residue of 2*l.* 11*s.* 6*d.* If it had that effect, in my opinion the order under Order XIV. ought never to have been made. But I do not think that it had that effect; nor that the decision in *Morel Brothers* v. *Westmoreland* (*Earl of*) (1) obliges us so to hold. In that case the Master of the Rolls more than once in his judgment referred to the fact of the judgment having been signed against the wife for the whole amount of the claim, and that the husband was afterwards sued for the same amount. No question there arose as to the effect of judgment being recovered against one of the two defendants for a part only of the claim. But it is now contended that the same principle ought to be applied whether the judgment has been signed for the whole or only for a part. With that I cannot agree. Lord Halsbury in *Morel Brothers* v. *Westmoreland* (*Earl of*) (2) accepts as correct the statement in the Yearly Practice of the Supreme Court that, "if the claim is against two defendants as alternatively liable, and judgment is signed against one, this rule (Order XIV., r. 5) does not enable the plaintiff to proceed against the other." By this I think he meant that the plaintiff cannot proceed against the other for the same debt. But here the debt which the plaintiff is seeking to enforce against the husband is not the same debt as that for which judgment was signed against the wife. They are distinct portions of the original claim. And there is to my mind nothing inconsistent with the judgment for one portion against the wife in seeking to recover the other portion from the husband. In my opinion the judgment of the county court judge was right and must be affirmed.

Appeal dismissed. Leave to appeal.

Solicitor for plaintiff: *M. E. Walhouse.*
Solicitors for defendant: *Tetley, Tree & Tetley.*

(1) [1904] A. C. 11. (2) [1904] A. C. 11, at p. 14.

J. F. C.

1905
July 5.

GOLDSMITHS' COMPANY *v.* WYATT.

Plate—Assay—Hall-mark—Foreign Watches—Customs Act, 1842 (5 & 6 *Vict.* c. 47), s. 59.

Gold and silver watch-cases imported into the United Kingdom from abroad are not "plate" within the meaning of s. 59 of the Customs Act, 1842, if they are imported together with the works as finished watches; *secus*, if the cases are imported separately from the works.

Special Case stated by the parties.

The action was brought by the plaintiffs qui tam for—

(1.) 40*l.* penalties under the statute 5 & 6 Vict. c. 47, s. 59 (The Customs Act, 1842), and 12 Geo. 2, c. 26, in respect of the sale and exposing for sale of certain gold and silver watch-cases, to wit, two gold watch-cases and two silver watch-cases of foreign manufacture imported into the United Kingdom from foreign parts since the commencement of the said Customs Act, 1842, which said gold and silver watch-cases were sold and exposed for sale in England before the same had been assayed, stamped, and marked as alleged to be required by the Customs Act, 1842, and the Hall-marking of Foreign Plate Act, 1904.

(2.) A declaration that the said gold and silver watch-cases were respectively gold and silver plate within the meaning of ss. 59 and 60 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall-marking of Foreign Plate Act, 1904.

Pursuant to the order of a master, the following case was stated for the opinion of the Court:—

The plaintiffs are the wardens and commonalty of the Mystery of Goldsmiths of the City of London.

The defendant carries on business as a watchmaker, jeweller, and dealer in plate at 198, Ebury Street, Eaton Square, in the county of London.

On March 14, 1905, four watches, of which two were in silver watch-cases and two in gold watch-cases, were exposed for sale by the defendant at his said shop, and were then and there sold by him to Sir Walter Sherburne Prideaux, an agent of the plaintiffs, for the sum of 7*l.* 7*s.*

None of the four said watch-cases are battered within the meaning of s. 59 of the Customs Act, 1842, nor are they richly engraved, carved, chased, or set with jewels or other stones, nor do they come within any other of the exceptions specified in s. 6 of 12 Geo. 2, c. 26.

They are each and all of them of foreign manufacture, and have been imported into the United Kingdom since the commencement of the Customs Act, 1842.

None of the four watch-cases were wrought or made prior to the year 1800. (1)

None of the four watches so exposed for sale and sold on March 14, 1905, had at the time of exposure for sale and sale been assayed or stamped and marked with the marks of the plaintiffs, or with the marks of any other duly authorized assay office in the United Kingdom.

All the said watch-cases bear Swiss Government hall-marks indicating the true standard of gold or silver employed in their manufacture, and the dome of one of them bears the mark "cuivre," denoting that the same is of base metal.

No legal proceedings have been instituted by the plaintiffs since the year 1842 in respect of the sale and exposing for sale of foreign watch-cases forming part of watches imported into the United Kingdom, and sold or exposed for sale before the same have been assayed, stamped, and marked.

Gold and silver watch-cases forming part of gold and silver watches imported into the United Kingdom since the passing of the Revenue Act, 1883, have not been entered to be warehoused nor deposited in a bonded warehouse, but have been delivered for home use before they have been assayed, stamped, and marked.

All highly finished articles of foreign plate, after being assayed, stamped, and marked by an assay officer, have to go back to the shop for the marks to be "set" and "finished" before such articles can be placed on the market.

The assaying, stamping, and marking of British-made watch-cases is invariably performed while the cases are in the rough

(1) By s. 6 of 5 & 6 Vict. c. 56, ornamental plate made prior to the year 1800 may be sold without being assayed.

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and before they are polished and before the movements are inserted in them.

Foreign-made watch-cases are now never imported into the United Kingdom without being made up into finished watches, but formerly such cases when intended to be assayed and marked were, like British watch-cases, sent to the assay offices in an unfinished state, and were subsequently "finished."

The points of law for the opinion of the Court are :—

(1.) Whether the said gold and silver watch-cases forming part of the said watches are respectively gold and silver plate within the meaning of ss. 59 and 60 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall-marking of Foreign Plate Act, 1904.

(2.) Whether upon the above facts the defendant is liable to the penalties under the Customs Act, 1842, which penalties are defined by 12 Geo. 2, c. 26.

Bankes, K.C., and *Graham Campbell*, for the plaintiffs. The cases of watches when made of gold or silver are plate within s. 59 of the Customs Act, 1842, and the seller of a watch with a gold or silver case which has not been assayed and marked is liable to the penalties imposed by 12 Geo. 2, c. 26. By s. 1 of this latter Act, which is intituled, "An Act for the better preventing frauds and abuses in gold and silver wares," no vessel, plate, or manufacture of gold or silver is to be made or sold in England of a less fineness than the standards therein prescribed. By s. 5, no person making or selling, trading or dealing in gold or silver wares, shall sell, exchange, or expose to sale in England "any gold or silver vessel, plate, or manufacture of gold or silver whatsoever" before it has been assayed and marked, under a penalty of 10*l.* for every such offence. Sect. 6 enumerates certain wares of gold or silver which are excepted from the requirement of being marked, but, as the special case finds, the watch-cases in question do not come within them. And s. 13 especially mentions gold watch-cases as coming under the head of gold plate, and limits the price which shall be charged for assaying and marking them. It may be that that Act does not apply to the sale of articles of

gold or silver imported from abroad. But by the Customs Act, 1842, s. 59, "All gold or silver plate, not being battered (1), which shall be imported from foreign parts after the commencement of this Act and sold, exchanged, or exposed to sale within the United Kingdom of Great Britain and Ireland, shall be of the respective standards now required for any ware, vessel, plate, or manufacture of gold or silver wrought or made in England; and no gold or silver plate so to be imported as aforesaid, not being battered, shall be sold, exchanged, or exposed to sale within the said United Kingdom until the same shall have been assayed, stamped, and marked either in England, Scotland, or Ireland in the same manner as any ware, vessel, plate, or manufacture of gold or silver wrought or made in England, Scotland, or Ireland respectively is or are now by law required to be assayed, stamped, and marked." It then provides that persons offending against the section shall be liable to the same penalties as are imposed by the Act of George II., and concludes with the proviso "that no article or ware of gold or silver so to be imported as aforesaid shall be liable to be assayed, stamped, or marked as aforesaid which would not be liable to be assayed, stamped, or marked if it had been wrought or made in England." This Act was intended to put gold and silver articles imported from abroad upon the same footing as similar articles made in England, and to include under the words gold and silver plate all articles which were included under "vessel, plate, or manufacture of gold or silver" in the earlier Act. The change of language in the proviso from "gold or silver plate so to be imported" to "article or ware of gold or silver so to be imported" shews that the draftsman treated the expressions as interchangeable. Then, if so, s. 59 applies to gold and silver watch-cases; and equally the provisions of s. 10 of the Revenue Act, 1883, 46 & 47 Vict. c. 55 (2), and of the Hall-marking of Foreign

(1) The term "battered" is explained in 43 Geo. 3, c. 68, Sched. A, "Plate," to mean "fit only to be remanufactured."

(2) The Revenue Act, 1883, by s. 10 provides that all imported plate shall be deposited in a bonded warehouse, and shall not be delivered out for home use until it has been assayed, stamped, and marked.

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Plate Act, 1904 (4 Edw. 7, c. 6) (1), also apply. There are various Acts of Parliament in which the Legislature has from time to time recognised watch-cases as coming under the description of plate. Thus, in 25 Geo. 3, c. 64, which was an Act for granting customs and excise duties upon all gold and silver plate imported or made in Great Britain, it is provided by s. 5 what shall be done in certain events "if such plate shall consist of watches," by which term watches is to be understood watch-cases. By the 38 Geo. 3, c. 24, the duty imposed by former Acts, "so far as the same relate to gold and silver plate used or to be used as and for watch-cases," was repealed. In 43 Geo. 3, c. 68, an Act for the granting of customs duties, it is true that in Sched. A watches were placed in a different category from plate; but the reason of that was that it was desired to tax the contents of the watch as well as the cases, and the duty accordingly upon watches was a percentage upon their value, whereas the duty upon gold or silver plate was a fixed sum per ounce troy. This duty on watches was repealed in 1860 by the 23 & 24 Vict. c. 22, s. 5. In 44 Geo. 3, c. 98, Sched. B, amongst the things upon which stamp duties are thereby imposed is included "Plate of gold which shall be made or wrought in Great Britain, and which shall or ought to be touched, assayed, and marked in Great Britain," from which duty there is a "Special exemption—Gold watch-cases." Then, if watch-cases are to be regarded as plate for the purposes of the Customs Act, 1842, they must equally be so whether they are imported separately or together with the works, for the object of the Act is to prevent purchasers being imposed upon, and the danger of their being imposed upon exists as much in the one case as in the other. Down to the year 1887 the makers of foreign watches were in the habit of importing their cases separately for the purpose of being assayed and marked. In that year the Merchandise Marks Act was passed; and thereupon they discontinued their former

(1) The Hall-marking of Foreign Plate Act, 1904, provides that foreign plate when assayed in the United Kingdom shall be marked in such a manner as readily to distinguish whether it was made in the United Kingdom or imported from abroad.

practice, and thenceforward imported the cases made up into watches with the works. If such watches are not still required to be assayed and marked, there is nothing to prevent watches being imported and sold here of much less than the standard quality of gold or silver. The fact that an article is not wholly made of gold or silver does not prevent it from being plate. The Act of 30 & 31 Vict. c. 90, by s. 1 imposes "excise duties on licences to deal in plate" upon every person who shall sell "any article composed wholly or in part of gold or silver": this would presumably include the case of a finished watch. In *Scott* v. *Solomon* (1), where tea dealers, who gave away watches to those of their customers who bought the largest quantity of tea during a certain period, were convicted under the last-mentioned Act of dealing in plate without a licence, it was admitted that the watches were plate, and the Court affirmed the conviction upon the assumption that that admission was correct.

Asquith, K.C., *Sebastian*, and *Newbolt*, for the defendant. No such contention as that a watch-case which is imported as part of a finished watch is liable to be assayed and marked as plate has ever been raised before, though the Act under which the proceedings are taken has been in force for sixty-three years. It is not disputed that a watch-case is plate if it is imported separately from the works; but the case of a finished watch stands upon a different footing. There is no definition of plate in the Customs Act, 1842, nor indeed in any of the Acts cited by the plaintiffs. Probably the meaning of the term must in each case depend upon the context in which it is found. What the Legislature in the Act of 12 Geo. 2, c. 26, were dealing with was the securing of a standard of fineness for home-made plate. The language there used was very wide: "wares or manufactures of gold or silver"—an expression which might possibly have included watches if the Act had applied to foreign-made articles, but it did not so apply. Then when we come to the Act of 1842, which does apply to foreign-made articles, the language is much narrower—"gold or silver plate,"

(1) [1905] 21 Times L. R. 230.

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the intention being to bring the narrower class, when imported, within the requirements as to assay and marking to which the wider class was subject when the articles were made in England. It is not every gold or silver ware that comes under the head of gold or silver plate. No one would say in common parlance that a watch was plate. The Legislature in the taxing Acts have, at all events since 1803, distinguished watches from watch-cases. In that year watches were treated as a distinct subject of taxation by 43 Geo. 3, c. 68, Sched. A. And they so continued to be taxed down to 1860, though in the meantime, by 44 Geo. 3, c. 98, Sched. B, gold watch-cases had been exempted from the taxation to which other gold plate was subject. The Legislature treated watch-cases as primâ facie coming under the head of plate, for otherwise the exemption would have been unnecessary. At the same time watches were distinguished from plate and put in a separate category of taxable subjects. Though a watch-case is plate when separate from the works, it ceases to be plate when the works are put into it. The accessory is merged in the principal thing; and a vendor of watches could no more be said to deal in plate than a bookseller could be said to deal in leather. The contention of the plaintiffs would if successful have the effect of reversing the policy of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), so far as it applies to watches. By s. 7 of that Act, where a watch-case has on it any marks which are by common repute considered as constituting a description of the country where the watch was made, such marks, if standing alone, shall be deemed to be a description of its country of origin. That Act was designed to prevent Swiss watches from being marked with the English hall-mark, and thereby being falsely described as English watches. And s. 8 provided that if a watch-case was brought to be assayed and was declared to be of foreign origin, the assay office was to place on it a mark differing from the mark placed on a watch-case made in the United Kingdom. Now it is sought to deprive the public of the protection of that Act, and to require that foreign watches shall be marked with the English mark.

Bankes, K.C., in reply.

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CHANNELL J. This case raises the question whether gold and silver watches are gold and silver plate within the meaning of s. 59 of the Customs Act, 1842, for if they are they are also within the other two Acts mentioned in the case. The word "plate" is one which is capable of a considerable diversity of meaning, and the difficulty is to determine what is the precise meaning that it ought to be held to bear in this particular section. But I cannot help saying at the outset that according to the ordinary use of language such an expression as gold and silver plate would not be understood to include a gold or silver watch. It is not an ordinary expression to use for such a thing. For instance, it is fairly clear that under a bequest of "all my plate" (without other words to assist the construction) a gold or silver watch would not pass. I have been referred to a number of statutes dealing with other matters of various kinds, some of which include watches within the category of plate and others of which exclude them. But I do not think that a consideration of those statutes helps us much. Thus, in the Acts imposing a customs duty on imported articles gold and silver watches are not included under the head of plate, but are placed in a separate class by themselves. But there are obvious reasons for that. A comprehensive class like "plate" is useful to embrace a variety of articles which are respectively imported in but small quantities; but when you are dealing for purposes of customs duty with specific articles which are imported in large quantities like watches, it would presumably be more convenient to place them in a class by themselves, especially when the amount of the duty payable is made to depend upon the value of the article, which value in the case of watches would lie as much if not more in the works than in the precious metal of the case. Therefore those Acts do not afford us much guide to the meaning of the term "plate" in the Act before us. Nor do the Acts relating to excise duty on plate made or wrought in Great Britain. The duty thereby imposed did for a time attach to watch-cases, though afterwards watch-cases were exempted from the duty, probably with the object of encouraging the manufacture and export trade in them. Nor is any assistance to be got from

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of right disclose no obligation on the part of His Majesty towards the suppliants, nor any right enforceable in this Court. Where the Sovereign annexes a foreign country the terms on which he does so are settled by him, and no Court of law has any power to interpret or enforce those terms. *Cook* v. *Sprigg* (1) is the latest of a long series of authorities which shew that annexation is an act of State, and that the municipal Courts have no authority to enforce obligations assumed by the conquering State under the treaty of annexation.

[They referred to *Nabob of the Carnatic* v. *East India Co.* (2); *Elphinstone* v. *Bedreechund* (3); *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (4); *Ex Rajah of Coorg* v. *East India Co.* (5); *Sirdar Bhagwan Singh* v. *Secretary of State for India* (6); *Doss* v. *Secretary of State for India* (7); *Rustomjee* v. *Reg.* (8); *The Commonwealth* v. *Sparhawk* (9); *United States* v. *Pacific Railroad.* (10)]

To take an extreme case, if a conquering State confiscated all private property in the conquered State, the owners of the property could not obtain redress by means of litigation in the municipal Courts of the conquering State. So, in the present case, His Majesty's Government having declined to recognise the suppliants' claim, this Court has no power to adjudicate upon it. The claim is in fact absolutely without foundation. Assuming that the Transvaal Government were under some contractual obligation to indemnify the suppliants, that obligation does not as a result of the annexation fall upon His Majesty. There is no principle of international law by which a conquering State becomes ipso facto liable to discharge all the contractual obligations of the conquered State.

Lord R. Cecil, K.C., and *J. A. Hamilton, K.C.* (*Theobald Mathew* and *A. M. Talbot* with them), for the suppliants. For the purpose of this demurrer the facts must be taken to be as

(1) [1899] A. C. 572.
(2) (1791) 1 Ves. Jr. 371; 2 Ves. Jr. 56.
(3) (1830) 1 Knapp P. C. 316; 2 St. Tr. (N.S.) 379.
(4) (1859) 13 Moo. P. C. 22; 7 Moore's Ind. Ap. Ca. 476.
(5) (1860) 29 Beav. 300.
(6) (1874) L. R. 2 Ind. Ap. 38.
(7) (1875) L. R. 19 Eq. 509.
(8) (1876) 1 Q. B. D. 487; 2 Q. B. D. 69.
(9) (1788) 1 Dallas, 383.
(10) (1886) 13 Davis, 227.

stated in the petition, and the case may therefore be argued on the basis that the gold was taken by the Transvaal Government under its constitutional powers, that the seizure was not made for the purpose of hostilities, and that at the moment of annexation the Transvaal Government was under an enforceable obligation to return the gold or its value. The case for the suppliants may be put in the form of three propositions, the first of which is that by international law, where one civilized State after conquest annexes another civilized State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State, except liabilities incurred for the purpose of or in the course of the particular war. The writings of jurists on international law and stipulations in treaties are evidence of what is international law, and the proposition in question is supported by the following authorities: Hall's International Law, 5th ed. p. 99; Wheaton's International Law, 4th ed. p. 46; Halleck's International Law (Baker's 1878 ed.), vol. ii. p. 504; Calvo's Droit International, 4th ed. vol. i. p. 248; vol. iv. p. 404; Heffter's Droit International de l'Europe, 4th ed. pp. 63, 64; Huber's Die Staatensuccession, s. 217. Secondly, international law is part of the law of England. This question has been much considered in cases relating to the rights and privileges of ambassadors: see *Barbuit's Case* (1); *Triquet* v. *Bath* (2); *Heathfield* v. *Chilton* (3); *Viveash* v. *Becker* (4); cases dealing with the seizure of debts: see *Dolder* v. *Huntingfield* (5); *Wolff* v. *Oxholm* (6); and cases turning on the law as to territorial waters: see *Reg.* v. *Keyn*. (7) All these cases have been dealt with by the English Courts on the footing that the principles of international law relating to them form part of the common law of England. Thirdly, the English Courts have recognised and adopted the particular principle of international law enunciated above as the

(1) (1737) Cas. t. Tal. 281.
(2) (1764) 3 Burr. 1478.
(3) (1767) 4 Burr. 2016.
(4) (1814) 3 M. & S. 284; 15 R. R. 488.
(5) (1805) 11 Ves. Jr. 283; 8 R. R. 159.
(6) (1817) 6 M. & S. 92; 18 R. R. 313.
(7) (1876) 2 Ex. D. 63.

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object of the section? Does the section apply to a composite article such as a watch, the value of which no doubt partly depends upon the quality of the gold or silver of which the case is made, but mainly upon the quality of manufacture of the internal parts of the watch? I think it does not. It may be that if very cheap works were put into a gold or silver case, the case might be the more valuable part of the two. But that would be of but rare occurrence, and in general the value of a watch lies mainly in the works, the quality of the metal of the case being of a secondary consideration. I do not think the protection afforded by the section was intended to extend to the purchaser of a finished watch, inasmuch as he does not in general buy it for the sake of the value of the case. Nor would a finished watch come within what persons would ordinarily understand by the use of the word plate. No one using that word in its ordinary sense would say that the mere fact that an article was partly made of silver or gold would bring it within the category of gold or silver plate. There is one argument which was addressed to me in support of the defendant's contention, and which I ought not to leave unnoticed, namely, that though the Act has been in force for more than sixty years no attempt has ever been made to treat finished watches as coming within its operation. Where indeed the Court is called upon to construe an Act of Parliament expressed in unambiguous language, it ought to put its own construction upon it regardless of the construction that has been commonly put upon it by other persons less skilled in the law. The fact that a mistaken interpretation has been generally put upon it cannot alter the law. But where the question is as to the meaning of an ambiguous term of common use, the fact that it has for a long period of years been understood in a particular sense by persons who have an interest or duty in enforcing the Act becomes very material. And I think I am entitled to take into consideration the fact that the ambiguous term plate, which may mean very different things in different contexts, has not been hitherto understood as covering a completed watch of which a part only is gold or silver. I do not think that in order to make a thing come within the term

"gold or silver plate" it would be necessary that it should be made entirely of gold or silver, but it must be a thing of which the precious metal is the main constituent of value, the part consisting of other material being merely accessory to the part which is made of gold or silver. But when the gold or silver which forms part of the article is accessory to the principal part which is not made of those metals, I think that it could not be treated as coming within the term "plate." I must answer both the questions raised in the special case in the negative.

Judgment for the defendant.

Solicitors for plaintiffs: *Prideaux & Sons.*
Solicitors for defendant: *James & James.*

J. F. C.

[IN THE COURT OF APPEAL.]

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MIDWOOD & CO., LIMITED *v.* MAYOR, ALDERMEN, AND CITIZENS OF MANCHESTER.

Nuisance—Statutory Powers—Electric Supply—Leakage of Electricity—Fusion of Electric Main—Explosion—Fire—Electric Lighting Acts. 1882, 1888 (45 & 46 *Vict. c.* 56; 51 & 52 *Vict. c.* 12)—*Manchester Electric Lighting Order,* 1890.

The defendants were empowered by the Manchester Electric Lighting Order, 1890, made under the Electric Lighting Acts, 1882 and 1888, and confirmed by Act of Parliament, to supply electrical energy in their district, and for that purpose to lay down electrical mains, but it was provided by clause 70 of the order that nothing therein contained should exonerate them from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. One of their mains fused, and the bitumen in which the main was laid in consequence became volatilized into an inflammable gas, which accumulated for some time, and then exploded, causing a fire by which the plaintiffs' goods were damaged:—

Held, that, apart from any question of negligence, the defendants were liable to the plaintiffs as for a nuisance by reason of the provisions of clause 70 of the order.

APPLICATION for judgment or a new trial in an action tried before Lawrance J. with a jury.

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The action was brought to recover damages in respect of injury to stock-in-trade and other property of the plaintiffs upon premises belonging to them in Manchester by a fire occasioned through the electrical apparatus maintained by the defendants, who were the undertakers for the supply of electricity for lighting and other purposes in Manchester. The claim of the plaintiffs was put alternatively, it being alleged first that the damage was due to a nuisance caused by the defendants, and secondly that the defendants were guilty of negligence which led to the damage.

It appeared that there had been a fusion of one of the electric cables or mains laid down by the defendants in a street in Manchester in consequence of a failure in the insulation of the conductors, which caused a breakdown in the insulation and a short circuit or leakage of electricity, whereby the bitumen in which the main was laid was volatilized in the form of inflammable gas; and, after the gas had been accumulating for some time, it found its way into a house adjoining the plaintiffs' premises in the street in which the main was laid, where it ultimately exploded and caused the fire by which the plaintiffs' property was damaged.

By a provisional order intituled the Manchester Electric Lighting Order, 1890, made by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and confirmed by the Electric Lighting Orders Confirmation (No. 11) Act, 1890 (53 & 54 Vict. c. cxcvii.), it was in substance provided that, subject to the provisions of the order and the principal Act, the corporation of Manchester, called in the order the undertakers, might supply electrical energy within the area of supply described in the order for all public and private purposes as defined by the principal Act, provided that such energy should be supplied only by means of some system approved by the Board of Trade, and subject to such regulations and conditions for securing the safety of the public, and for ensuring a proper and sufficient supply of energy, as the Board of Trade might from time to time impose, and that the undertakers should not permit any part of any circuit to be connected with earth, except so far as might be necessary for carrying out the pro-

visions of any such regulations and conditions as aforesaid, unless such connection was for the time being approved of by the Board of Trade with the concurrence of the Postmaster-General, and was made in accordance with the conditions, if any, of such approval. The necessary powers for breaking up streets in order to lay the undertakers' mains for the carriage of electricity were given by the order; and it was provided that the undertakers should within a period of two years after the commencement of the order lay down suitable and sufficient distributing mains for the purposes of general supply throughout every street or part of a street specified in that behalf in the 2nd schedule to the order, and should thereafter maintain the same; and that, in addition to those mains, the undertakers should, at any time after the expiration of eighteen months from the commencement of the order, lay down suitable and sufficient distributing mains for the purposes of general supply throughout every other street, or part of a street, within the area of supply, upon being required to do so in manner by the order provided. The order contained provisions enabling six or more owners or occupiers of premises in any street or part of a street to serve a requisition on the undertakers requiring them to lay down distributing mains for the purposes of general supply throughout the street or part of a street, and providing for the determination of questions between the undertakers and those making the requisitions by the Board of Trade. It was also provided that the undertakers, on being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the undertakers, in which they were for the time being required to maintain, or were maintaining, a supply of energy for the purposes of general supply to private consumers under the order, or any regulations and conditions subject to which they were authorized to supply energy under the order, should give and continue to give a supply of energy for such premises in accordance with the provisions of the order, and should furnish and lay down any electric lines that might be necessary for the purpose of supplying the maximum power with which any such owner or occupier might be entitled to be supplied under

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the order, subject to certain conditions subsequently specified in the order.

Then followed provisions as to the maximum power with which consumers should be entitled to be supplied. The undertakers were to be subject to a penalty for failure to supply energy to owners or occupiers to whom under the order they were required to supply energy. Clause 67 of the order was as follows: "The undertakers shall be answerable for all accidents, damages, and injuries happening through the act or default of the undertakers, or of any person in their employment, by reason of or in consequence of any of the undertakers' works, and shall save harmless all authorities, bodies, and persons by whom any street is repairable, and all other authorities, companies, and bodies, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents, damages, and injuries." Clause 70 of the order was as follows: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." Regulations had been made by the Board of Trade under the provisions of the order for securing the safety of the public, and for ensuring a proper and sufficient supply of electrical energy. By those regulations it was provided (inter alia) that, from and after the time when the undertakers commenced to supply energy through any distributing main, they should maintain a supply of sufficient power for the use of all consumers for the time being entitled to be supplied from such main, and such supply should, except so far as the Board of Trade might authorize from time to time, be constantly maintained; and that, during the whole period when a supply of energy was required to be maintained by the undertakers in the distributing mains under the order and the regulations, it should be maintained at a constant pressure, in the regulations termed the standard pressure.

It appeared that the system which was adopted by the defendants for the supply of electrical energy under the order, and which had been approved by the Board of Trade, was one in which all the electric mains laid by the defendants were

linked together, and were fed at as many points as possible with electricity by cables coming from generating stations. It was alleged by the defendants that by this system it was possible to keep up a more constant pressure in the mains over the whole area of supply. The case put forward by the plaintiffs, but denied by the defendants, was that under this system it was more difficult to localize the spot at which a leakage of electricity was occurring, and remedy the same, than under a system in which the district was divided into distinct sets of mains, and that the defendants had been negligent in not taking proper steps to localize and remedy the leakage which had caused the damage.

In answer to questions left to them by the learned judge, the jury found (1.) that the system adopted by the defendants constituted a nuisance by causing danger to persons having premises adjacent to the mains; (2.) that the defendants were guilty of negligence in their adoption of the method of localizing and dealing with faults; (3.) that, when the defendants became aware of the fault, they did not deal with it for the purpose of preventing fire in a reasonable and proper manner. (1)

Upon these findings the learned judge gave judgment for the plaintiffs for an amount agreed upon as damages.

Moulton, K.C., and *Macmorran*, K.C. (*J. W. Gordon* with them), for the defendants. The defendants cannot be liable as for a nuisance in respect of the system of electric lighting which was authorized by the statutory order, and approved by the Board of Trade, and under which they were bound to supply electrical energy to consumers on pain of incurring penalties. If their system were a nuisance, they would be indictable in respect of it, and could be compelled to remove it, which would be absolutely inconsistent with the existence of the powers given and obligations imposed by the order. Clause 70 of the order cannot be intended to have that meaning. No

(1) The evidence and arguments with regard to the nature of the system adopted by the defendants, and to the question of negligence, which were very lengthy and involved much complicated scientific detail, are not given, as only questions of fact appeared to be thereby raised.

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doubt the corporation, in carrying out the system sanctioned under the order, must use the best means of doing so. The "nuisance" contemplated by clause 70 is, it is submitted, some incidental nuisance caused by defects of apparatus and such like, not the system itself which the defendants are authorized to establish. There was no evidence upon which the jury were entitled to find as they have done in answer to any of the questions left to them. (1)

[They cited *Readhead* v. *Midland Ry. Co.* (2); *Geddis* v. *Proprietors of Bann Reservoir* (3); *Brocklehurst* v. *Manchester, Bury, Rochdale and Oldham Steam Tramways Co.* (4); *Hammond* v. *Vestry of St. Pancras* (5); *Bateman* v. *Poplar District Board of Works* (6); *Stretton's Derby Brewery Co.* v. *Mayor of Derby.* (7)]

Sir E. Clarke, K.C., and *Bousfield, K.C.* (*Wood Hill* with them), for the plaintiffs. The evidence justified the findings of the jury. But, apart from the findings of the jury, and upon the undisputed facts, the defendants are liable. It is not necessary, in order to sustain the judgment, that the existence of the defendants' system should in itself be a nuisance. In the absence of statutory authority the doctrine of *Rylands* v. *Fletcher* (8) would clearly apply, and the defendants, having altered the natural state of things by bringing into existence, and storing, a dangerous agent like electricity, would be liable as for a nuisance upon its escaping and doing mischief. The effect of clause 70, and other similar provisions in such cases, is to leave the undertakers in that position, notwithstanding the statutory powers given. The defendants are empowered to generate and supply electricity, but, inasmuch as it is a powerful and dangerous agent, and there are exceptional risks and uncertainties in connection with it, the Legislature seem to have thought it only just that the body who are empowered to supply it for their own profit should do it at their own risk, and only on the terms that they must bear the loss, if damage

(1) Ante, p. 601, n. (1).
(2) (1869) L. R. 4 Q. B. 379.
(3) (1878) 3 App. Cas. 430.
(4) (1886) 17 Q. B. D. 118.
(5) (1874) L. R. 9 C. P. 316.
(6) (1887) 37 Ch. D. 272.
(7) [1894] 1 Ch. 431.
(8) (1868) L. R. 3 H. L. 330.

is occasioned to an individual, who, it must be remembered, may very likely have no interest in the supply of electricity and not be a consumer.

[They cited *Rex* v. *Pease* (1); *Vaughan* v. *Taff Vale Ry. Co.* (2); *Jones* v. *Festiniog Ry. Co.* (3); *Powell* v. *Fall* (4); *National Telephone Co.* v. *Baker* (5); *Shelfer* v. *City of London Electric Lighting Co.* (6); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (7); *Batcheller* v. *Tunbridge Wells Gas Co.* (8); *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Companies.* (9)]

Moulton, K.C., for the defendants, in reply. Assuming the system of electric supply adopted by the defendants not to be a nuisance in itself, and the defendants not to have been guilty of negligence, a sudden accident such as this, casually occurring in the course of working without any defect in the system itself, and the cause of which is not allowed to continue longer than can be avoided, cannot appropriately be regarded as a "nuisance" within the meaning of that term as used in clause 70. In the case of gas, for instance, an accidental escape of gas leading to an explosion could hardly be considered as a "nuisance" coming within such a provision. It is submitted that what is contemplated by such a clause is something of a continuous nature such as habitual vibration or production of effluvia.

COLLINS M.R. This is an application for judgment or a new trial in an action brought against the corporation of Manchester, who conduct the electric lighting of the city, in respect of damage occasioned to property belonging to the plaintiffs through an explosion brought about by the operation of the system of electric lighting maintained by the defendants. The cause of the explosion was a leakage of electricity that had the effect of fusing the bitumen in which an electric main was incased, with the result that an inflammable gas was

(1) (1832) 4 B. & Ad. 30; 38 R. R. 207.
(2) (1860) 5 H. & N. 679.
(3) (1868) L. R. 3 Q. B. 733.
(4) (1880) 5 Q. B. D. 597.
(5) [1893] 2 Ch. 186.
(6) [1895] 1 Ch. 287.
(7) [1899] 2 Ch. 217.
(8) (1901) 84 L. T. 765.
(9) [1902] A. C. 381.

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produced, which exploded and set fire to premises adjoining those of the plaintiffs.

The first question raised for discussion is whether the defendants are protected from liability by statute. They contend that, inasmuch as they are a body endowed with statutory powers, by virtue of which they laid their electric mains in accordance with regulations prescribed by the Board of Trade, and inasmuch as no care or skill was wanting on their part, they are protected from liability by statute. On the other hand the plaintiffs point out that by clause 70 of the Electric Lighting Order of 1890, which was confirmed by statute, it is provided that "nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." That provision raises the principal point which we have to deal with in the present case.

Another point was raised at the trial with reference to which questions were left to the jury. The plaintiffs alleged that the mischief of which they complained had been brought about by negligence on the part of the defendants; that there were defects in the system by which the defendants carried on the electric lighting of the city, which rendered such mischief as occurred probable, and that they had not adopted the best and most recently known means of speedily localizing the source of such mischief and remedying it. The jury have answered questions left to them in such a manner as to affirm that there was negligence on the part of the defendants, which led to the accident, and judgment was given for the plaintiffs on that ground as well as on the footing that the defendants were liable on the terms of the statute as for a nuisance, irrespective of any question of negligence.

I will deal first with what seems to me to be the first and main point, which is whether the defendants are liable as for a nuisance irrespective of negligence. It has hardly been contended, though perhaps I cannot say it has not been contended, that in this case there was in point of fact no nuisance. It cannot, I think, seriously be contended that, where the premises of an adjoining owner are blown up by an explosion

brought about through the agency of the defendants' system of electric lighting, there is not a nuisance. Whether the defendants are liable in respect of it is, of course, another matter. There was a gradual accumulation of explosive gas brought about by the fusion of the bitumen by the operation of the overheated electric wires, which process went on for some three hours, and ultimately resulted in an explosion. If that was not a nuisance I do not know what would be one. Therefore, there clearly having been a nuisance caused by the defendants, the question is whether the defendants are protected by any statutory provision, for otherwise their liability is clear. The statutory enactment upon which they have to rely for protection is one which contains a provision that "nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them." It was ingeniously argued by the counsel for the defendants that, notwithstanding the clearness of this language, it must be read subject to what they say is the underlying right of the defendants under the order to place their electric mains where they have placed them, and to the obligation imposed upon them by the order to keep a supply of electricity in those mains: that the defendants have done nothing but what they were authorized by the order to do; and therefore, as I understood the argument, that the words of clause 70 of the order must be rejected, because they are inconsistent with the paramount provision of the order, authorizing the defendants to put their mains where they have put them, and the obligations incident to the position of the defendants as the undertakers under the order; and that, consequently, apart from negligence, the defendants are not liable. This argument appears to me to confuse the true order of ideas. The whole of the provisions of the order must be read together, and, so reading them, their effect appears to me to be that a qualified permission only is given to the undertakers. They are permitted to lay down their mains, and send electricity along them, subject to the obligations and terms imposed upon them by the provisional order, and the regulations of the Board of Trade; but underlying the whole is

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a condition imposed for the protection of the public upon an undertaking of this kind, which is not yet in its final stage of development, and may involve undiscovered risks, which it would not be fair to throw upon the public. While on the one hand the privilege is conferred upon the defendants of laying down their mains and supplying the city with electricity, on the other hand their powers are fenced round with a provision for the benefit of the public, throwing the risk of any nuisance which may be caused by the exercise of those powers upon the undertakers. Permission is given to the defendants to do the things provided for by the order, but if, in doing them, they occasion a nuisance, they must bear the consequences. They are not given a carte-blanche to create a nuisance. If and so far as they can do the things authorized without occasioning a nuisance to any one, they may lawfully do them; but, if and so far as they cause a nuisance by doing them, they are not only not protected by the Act, but they are made liable by its express terms. It is not necessary for me to go through the cases to which we have been referred, and which seem to me clearly to establish the correctness of the view which I have been endeavouring to express. I will, however, refer to what was said by Lord Halsbury L.C. in the case of *Shelfer* v. *City of London Electric Lighting Co.* (1) The particular nuisance complained of in that case was not the same as that in the present case. There an electric lighting company had erected powerful engines and other works on land near to a house subject to a lease, and, owing to vibration and noise from the working of them, structural injury was caused to the house, and annoyance and discomfort to the lessee. The same argument in substance was used for the defendants in that case by the same counsel as in the present case. Lord Halsbury L.C. said in dealing with that argument: "The nuisance being established, it is said, first, that the defendant company are authorized by law to carry on their business, and that, as they have done all that skill and care can effect to prevent any nuisance, they are in the same position as a railway company, and are entitled to do what they have done under the authority of the Legislature. If the analogy were a correct one, I should

(1) [1895] 1 Ch. 287.

think the defendants had fallen very far short in their proof that they had done all that was possible to prevent a nuisance. A railway company has a definite line of operation within which it may make its works, and, if it does all that can be done to prevent a nuisance in that place, the thing having to be done in that place, and by locomotive engines with the necessity of fire being carried along the railway, the Legislature is taken to have sanctioned that proceeding. No such considerations apply here, quite apart from the difference in the legislative enactments, with which I will deal presently. . . . The main question turns on the construction of the Electric Lighting Act, 1882, and the provisional order, which has become an Act of Parliament. It was boldly contended by Mr. Moulton that the provisional order protected the undertaking, and that, if a nuisance were necessarily created by the carrying on of the company's undertaking, such nuisance was authorized and even imposed as a duty on the undertakers." The learned Lord Chancellor then proceeded to refer to the terms of the Electric Lighting Act, 1882, s. 10, and those of a clause of the provisional order in that case, which was substantially the same as clause 70 of the provisional order in this case, and said: "The General Act only gave them power subject, therefore, to the restrictions of the particular order, and the particular order makes them liable for nuisance." It seems to me that that case is really on all-fours in point of principle with the present, and that by reason of the provision of clause 70 of the order what clearly amounted to a nuisance is unprotected, and therefore the defendants are liable to make good the damage occasioned to the plaintiffs, apart from any question of negligence. That is sufficient to decide the case.

I think, however, that perhaps it would be wrong not to express some opinion with regard to the question of negligence. It has been contended that there was no evidence upon which the learned judge ought to have left any question as to negligence on the part of the defendants to the jury. I have come to the conclusion that there was evidence on the question of negligence which the judge would not have been justified in withdrawing from the jury. [The Master of the Rolls then

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discussed the evidence as bearing on the question of negligence.] It seems to me that, the obligation resting upon the defendants to use all reasonable known means to secure the public against such damage as was occasioned in this case, there was evidence fit for the consideration of the jury of failure on their part to use reasonable care in ascertaining where the source of the mischief was and remedying it when discovered. It does not appear to me necessary under the circumstances to deal particularly with the precise form of the questions left to the jury in this case; but I wish to be understood as confining my observations to the question of negligence on the part of the defendants in dealing with the particular mischief that arose in this case, and not as intending to deal with the broader question whether the mere existence of the system of electric lighting adopted by the defendants in itself constituted negligence on the part of the defendants or a nuisance. I think the questions put to the jury, though in terms perhaps capable of a wider meaning, were intended to be directed to the question whether the defendants were guilty of any negligence in the action which they took in reference to this particular occasion. I do not think they were intended to raise the question whether the defendants' system of electric lighting of itself ipso facto constituted an actionable wrong. Of course there might be such a series of mischiefs arising out of a particular system of electric lighting as to lead to the presumption that the very existence of the system in itself involved such risk of mischief to the community as to constitute it a nuisance, apart from the particular mischief happening in a particular case to an individual. I do not, however, think that the jury in this case were invited to give their verdict on the system of electric lighting adopted by the defendants, apart from the particular mischief caused to the plaintiffs. I am clearly of opinion that upon the ground that the defendants have in law no answer to the plaintiffs' claim in respect of a nuisance occasioned to them by the defendants, the present application must fail.

ROMER L.J. I am of the same opinion. It is expressly provided by clause 70 of the Manchester Electric Lighting

Order, 1890, that nothing in the order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. Here there clearly was a nuisance caused by the defendants. There was a considerable leakage of the electricity stored by them in their mains, which caused an accumulation of inflammable gas, and ultimately an explosion and fire, by which the property of the plaintiffs in premises of theirs adjoining the street was injured. It seems therefore clearly a case in which, under the terms of clause 70, liability on the part of the defendants is established. I can find nothing in the terms of the other clauses of the order to relieve them from liability. I agree that by the order certain works are expressly authorized to be done by the defendants, and, therefore, as regards those works, it may properly be said that, upon the true construction of the order, they could not be treated as being in themselves a nuisance under clause 70. For example, express power is given to break up the streets for the purpose of laying mains, to lay mains, and to send electricity along them; but there is no authority, either expressly, or I think impliedly, given to the defendants by the order authorizing them to allow a leakage of electricity from their mains so as to cause an explosion, or to injure the property of the plaintiffs in the way in which they have injured it. That being so, there is in my opinion an end of the case. On the authorities as they stand at the present day, I do not think that there is any ground upon which the defendants can be absolved from liability for the damage occasioned by them to the plaintiffs. It does not appear to me to be necessary for the purposes of this case to deal with the findings of the jury on the questions submitted to them, but I think it right to say that, as at present advised, I am not satisfied that their first finding can be supported, if that finding means that the mere system of electric lighting adopted by the defendants in itself constitutes a nuisance. I think it right to say this, having regard to the great burden which might be cast upon the defendants, if it were to be assumed that this Court approved of the finding in that sense.

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MATHEW L.J. I agree. With regard to the first finding of the jury, to which Romer L.J. has referred, if it is to be taken as meaning that the system adopted by the defendants is in itself a nuisance, it would seem to lead to the somewhat startling consequence that, apart from actual mischief, it would be open to any one who might possibly be endangered by that system to indict the corporation for a nuisance in respect of it. I do not think that can have been intended. The provisional order provides that the system of supply to be adopted must be approved by the Board of Trade. That is a provision inserted for the protection of the public, but of course the approval of the Board of Trade is not conclusive as to the safety of a system. Defects may be discovered in the course of working. The question is whether it was intended by the Legislature that, if the system adopted should turn out not to be perfect, and adjoining property should be endangered, in that case the owner of that property should have no remedy at law. It seems to me impossible to read the provisions of the order with regard to nuisance without seeing that such was not the intention. The provisions of the order seem to me to come to this. A concession is granted to the undertakers, giving them the right to carry on a dangerous business, to which latent risks may be incidental that cannot be prevented by any degree of care; and, that being so, it was thought reasonable that those who are empowered to carry on that business for their profit should have to bear the inevitable loss arising from such risks. Clause 70 of the order seems to me decisive. I think the provisions of clause 67 of the order in this case must be read by the light of clause 70. The decision in *Brocklehurst* v. *Manchester, Bury, Rochdale and Oldham Steam Tramways Co.* (1) appears to me to have no application to the present case by reason of the difference of the nature of the business involved in the respective cases. In the case of a tramway it may be enough to provide that the business shall be carried on with all reasonable care, because the incidents of that business are well known and obvious; but the difficulties and risks incidental to the business here in question are not well

(1) 17 Q. B. D. 118.

known and obvious, and so the Legislature may reasonably provide by clause 67 as well as clause 70 that they shall be borne by the body who are authorized to carry it on, and not by innocent members of the public who may be damaged by reason of the concession made to the defendants. With regard to the other points, I agree with the Master of the Rolls and my brother Romer L.J. I think that there was evidence for the jury that proper precautions were not taken for dealing promptly with such a contingency as occurred. But it appears to me that, upon the point of law which has been dealt with, the case for the plaintiffs is established.

Application dismissed.

Solicitors for plaintiffs: *Bower, Cotton & Bower, for Janion & Hall, Manchester.*

Solicitors for defendants: *Austin & Austin, for Thomas Hudson, Manchester.*

E. L.

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1905

April 17; *June* 2, 6.

[IN THE COURT OF APPEAL.]

DE BEERS CONSOLIDATED MINES, LIMITED, Appellants; HOWE (Surveyor of Taxes), Respondent.

Revenue—Income Tax—Residence—"Person residing in the United Kingdom" Company registered Abroad—Head Office Abroad—General Meetings Abroad—Directors' Meetings in England and Abroad—Majority of Directors in England—Company's Business in England and Abroad—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A foreign corporation may be resident in this country for the purposes of income tax.

A company was incorporated and registered in South Africa. The office denominated its head office was in Kimberley in the Cape Colony, and it had an office in London. It owned extensive diamond mines in South Africa. The essential part of its business was the sale of the diamonds from its mines to a syndicate of diamond merchants of London under such conditions as to control the diamond trade of the world. The contracts of sale, which were annual contracts dealing with a year's output, were executed in London; they provided for the sale of diamonds to the syndicate, with delivery at Kimberley, in specified amounts at specified prices, and contained terms regulating the output of diamonds, the effect of which was to control the diamond trade. The general meetings of the company were held in Kimberley. Members of the company might name an address in South Africa to be registered as their address for the service of notices, and any member not naming such an address was to be deemed to have waived service of the notice upon him. The control of the company was vested in three life governors and sixteen ordinary directors, of whom four had to reside in England. Two of the three life governors and nine of the sixteen ordinary directors resided in the United Kingdom. The chairman and six ordinary directors resided in the Cape Colony. Meetings of the directors were held weekly in Kimberley and London with an interchange of minutes between the two places. The proceedings of the boards of directors sitting in Kimberley and London were regulated by by-laws which provided as follows: (1.) That the course of business respecting technical management of the company's work and operations at its mines, expenditure for wages, and such like, should be determined upon by the directors in Kimberley, who should however consult the directors in London on matters of exceptional importance: (2.) All other expenditure exceeding 25,000*l.* was to be determined upon by the majority of all the directors; but the directors in Kimberley with the sanction of the chairman might under special circumstances incur expenditure not exceeding at one time 50,000*l.* in addition. No further expenditure could be incurred unless the authority of the Kimberley directors was confirmed by the

majority of all the directors: (3.) The policy of the board respecting the disposal of diamonds and other assets, the working or development of the mines and the output of diamonds, application of profits, and appointment of directors was to be determined by the majority of all the directors: (5.) Matters to be determined by the majority of all the directors were to be determined by resolution to be submitted to meetings of directors in Kimberley and London, and the decision was to be in accordance with the vote of the majority thus ascertained: (6.) Except as before provided the directors in Kimberley and the directors in London were to have equal and concurrent authority. The majority of the directors was always in London. Matters referred to in by-law 3 were always dealt with in London, and in all important matters under by-law 5 the majority voting had always been in London. No case had ever occurred where the directors in Kimberley had overruled the decision of the directors in London. Under powers conferred upon the directors generally, the directors in London had appointed four committees to control various departments of the company's business and report to them. The general accounts of the company were kept at Kimberley, but the majority of the directors had a controlling influence upon the accounts:—

Held, that the conclusion to be drawn from the facts was that the company was residing in the United Kingdom within the meaning of s. 2, Sched. D, of the Income Tax Act, 1853, and also that the company exercised their trade in this country within the meaning of the same schedule.

CASE stated under s. 59 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), by the Commissioners for the general purposes of the Income Tax Acts for the City of London on appeal against an income tax assessment.

1. At a meeting of the Commissioners for the general purposes of the Income Tax Acts for the City of London, held at the Guildhall in the said City on Thursday, July 31, 1902, the De Beers Consolidated Mines, Limited (hereinafter called the appellant company), of 62, Lombard Street, in the City of London, appealed against a supplementary assessment made upon them for the year ending April 5, 1901, in the sum of 1,557,693*l.*, and against an additional assessment for the year ending April 5, 1902, in a similar sum of 1,557,693*l.* in respect of the profits of the company in the United Kingdom and elsewhere.

2. The appellant company was registered with limited liability in the Deeds Office of Griqualand West, in the Colony of the Cape of Good Hope (hereinafter for brevity termed "the

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Cape Colony") on March 13, 1888. It was also registered on September 3, 1888, as an incorporated company in the said Colony in terms of s. 3 of Act 13 of 1888 of the said Colony according to the laws then subsisting in the said Colony. The appellant company is not registered in the United Kingdom as a joint stock company.

3. The present authorized capital of the appellant company is 4,500,000*l.* in 800,000 preference shares and 1,000,000 deferred shares of 2*l.* 10*s.* each, having been increased to that amount from 3,950,000*l.* in December, 1901. The company has also 3,500,000*l.* 5 per cent. first mortgage debentures authorized and issued in 1894 under a scheme for consolidation and conversion of the company's debenture debt of which there are outstanding 2,638,320*l.*, also 301,780*l.* De Beers 4½ per cent. Bultfontein Obligations authorized and issued in May, 1900, of which there are outstanding 205,480*l.*, and also 1,750,000*l.* De Beers South African Exploration 4½ per cent. debentures authorized and issued in June, 1900, all of which are outstanding.

4. By art. 3 of the articles of association it is provided that the head office of the company shall be in Kimberley in the Cape Colony, or at such other place either in the said Colony or in such other country as the directors shall from time to time consider advisable, with such branch or branches elsewhere as the directors shall deem fit, or with such agent or agents in other places or countries as the directors may deem fit. The company has offices at London and at Kimberley.

5. The appellant company owns or is interested in extensive diamond mines and mining property in South Africa, together with various farms and landed property there, and investments in English Government securities and shares in an English joint stock company.

6. The profits of the appellant company during the years of assessment and for many years previously have been chiefly made by the raising and sale of diamonds, the produce of their said mines, to a syndicate composed of six or seven firms of diamond merchants, with whom the company have had a series of contracts in that behalf since the year 1895, including

an agreement dated December 2, 1901. (1) The said contracts were negotiated and executed in London, and the firms

(1) This was an agreement made between the appellant company, whose London office was stated to be at No. 62, Lombard Street, in the City of London, of the first part, and seven firms, all carrying on business as merchants and diamond merchants in the City of London and therein called the syndicate, of the other parts. By this agreement it was (inter alia) provided that the company should sell and the syndicate should purchase the output of rough diamonds as it was produced, including débris, tailings, and small diamonds produced and got from the De Beers, Kimberley, and Wesselton Mines of the company during the months of October, November, and December, 1901, and the months of January and February, 1902, up to but not exceeding on an average a monthly total of 105,000 carats from the De Beers and Kimberley Mines, and on an average a monthly total of 35,000 carats from the Wesselton Mine. The agreement then provided for the prices to be paid by the syndicate to the company. Delivery of diamonds was to take place at Kimberley, and payment was to be made in cash or its equivalent against each delivery. The company was to retain until February 28, 1902, in hand its entire output of rough diamonds produced from any of its mines during the months of August and September, 1901. The syndicate were to keep accounts of all transactions relating to diamonds purchased from the company. By clause 10 of this agreement, in addition to the payments to be made by the syndicate to the company, the syndicate were to account for and pay to the company one-half of all net profits made by the syndicate on realization or dealing with the diamonds under this agreement as appearing from the accounts, and all risks in the realization or dealing with the diamonds were to be on joint account, and borne by the company and the syndicate in equal shares, and if the syndicate covered any risks it was to cover them on joint account, subject, however, to the terms of clause 11, by which the syndicate, in making up the accounts, were entitled to charge as part of the expenses of realization and dealing with the diamonds purchased from the company, all charges incidental to the importation and sale of the same and all insurances, and in addition 30,000*l.* per annum to cover office rent, secretarial and accountancy charges and expenses, and also a sum equal to 5 per cent. on the net amount of goods sold or brought into account. The 5 per cent. was only to be charged if the account shewed an equivalent amount of profit made; but if the profit made did not reach 5 per cent., then whatever profit was made was to go to the syndicate, and if a loss was made the loss was to be borne in equal parts by the company and the syndicate. The syndicate was also entitled to charge, and was to be debited with, interest at the rate of 5 per cent. per annum in account current in respect of all moneys advanced or received by them in connection with the realization and dealing with the said diamonds. By clause 12 the syndicate was entitled to purchase from the company the output of rough diamonds (including débris and small diamonds) produced and got from the De Beers, Kimberley,

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composing the syndicate are all therein described as of London. These contracts, which vary greatly in detail, provide for the purchase by the syndicate (with delivery at Kimberley) of the produce of the mines up to the amounts specified at specified prices with various and often complicated options in respect of the remainder, and with provisions for the company sharing in certain profits to be made by the syndicate on resale, and other provisions designed to control or affect the output and sale of diamonds from the company's mines.

The object and effect of these arrangements by the company (who practically control the diamond trade of the world) is to

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Wesselton, Bultfontein, and Dutoitspan Mines, and any other mines under the control of the company during the months of March, April, May, and June, 1902, provided the syndicate on or before February 20, 1902, gave notice to the company that it elected so to do. The price to be paid for the diamonds purchased under this clause was to be ascertained as follows: The syndicate was to inform the company of the net price realized for the diamonds then already sold and the net estimated price to be realized on the diamonds then in hand, and the syndicate was to pay for the diamonds to be purchased a sum per carat equal to the total average prices so realized and estimated respectively, less 12 per cent. thereof. If the syndicate should not elect to purchase under clause 12, the company were to be at liberty to sell the diamonds elsewhere, giving the syndicate the first offer to purchase them at the price and on the terms at and on which the company were willing and able to sell them. By clause 15, if the syndicate elected to purchase, it was to have a similar right as to the output for the months from July to December, 1902, the election to be made on or before June 20, 1902, at the same price as already provided. And it was to have the like option during each succeeding six months until June 30, 1906. By clause 17, on June 30 in each year the syndicate was to prepare a balance-sheet shewing the result of the dealings in diamonds to be audited by the auditors of the company in London, and all sums thereby shewn to be due to the company from the syndicate, or vice versâ, were forthwith to be paid by the syndicate to the company or by the company to the syndicate, as the case might be. By clause 19 the company were not during the continuance of the agreement to sell or otherwise dispose of any rough diamonds, large or small, or débris, or fine sand diamonds, small stuff, or rubbish to any firm, syndicate, or corporation except the syndicate, but the syndicate was to have the option at any time of purchasing from the company the excess of diamonds, large and small, débris, and fine sand diamonds, small stuff, and rubbish produced from any mines under the control of the company over and above the quantity purchased by the syndicate from the company under the agreement.

regulate and support the market for diamonds, and the negotiation and maintenance of these arrangements is an essential part of the business of the company.

7. The articles of association of the appellant company were put in evidence, and were to be taken as forming part of the case. (1)

8. The management of the business and the control of the appellant company during the years of assessment were, under the articles of association, vested in three life governors and sixteen ordinary directors. There were three trustees for the 5 per cent. debenture-holders and two trustees for the South African Exploration debentures.

By the articles of association it was provided that four at least of the directors should reside in England.

9. Meetings of directors have been held at the company's office in London weekly from November 21, 1888. Weekly meetings of directors have also been held at Kimberley during the same period and minutes have been kept. At the first meeting in London on November 21, 1888, twelve directors were present including two life governors. Minutes of the proceedings at all meetings in London and Kimberley have been duly kept. There is an exchange of minutes between the two places—London and Kimberley. The proceedings of the board of directors sitting in Kimberley and London are regulated by by-laws framed pursuant to Nos. 107 and 119, sub-s. 21, of the company's articles of association.

10. These by-laws, having been drawn up in London and communicated to Kimberley, were discussed and finally approved at meetings of directors held in London on February 10, 12, and 17, 1891. Fifteen directors including the chairman (the Right Honourable Cecil J. Rhodes) were present at the meeting on February 10, 1891; ten directors were present on February 12, 1891; and fourteen directors including the chairman (the Right Honourable Cecil J. Rhodes) were present at the meeting on February 17, 1891.

The by-laws are as follows:—

"(1.) The course of business as respects the technical

(1) The articles of association which appear to be material are set out in a note at the end of this case, p. 644, post.

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management of the company's work and operations at its mines and the expenditure there for wages, materials, and such like shall be determined upon by the directors for the time being in Kimberley, who will however, where practicable, consult the directors for the time being in London on matters of exceptional importance.

"(2.) All other expenditure exceeding 25,000*l.* shall be determined upon by the majority of all the directors for the time being; but the directors for the time being in Kimberley, with the previous sanction of the present chairman of the board, the Honourable Cecil J. Rhodes, may, should special circumstances arise, expend or incur liabilities not exceeding altogether at any one time 50,000*l.* in addition to the above 25,000*l.* No further expenditure or liability under this proviso shall be incurred until the previous exercise of the authority hereby given has been confirmed by the majority of all the directors for the time being.

"(3.) The policy of the board (*a*) as respects the disposal of its diamonds or other assets, (*b*) in connection with the working or development of the company's mines and the output of the diamonds, (*c*) as respects the application of the company's profits, and (*d*) as respects the appointment of elected directors and the filling up of casual elective vacancies in the board of directors, shall be determined by the majority of all the directors for the time being.

"(4.) In the case of an equality of votes upon any question submitted for the decision of the directors the chairman of the board shall have a casting vote.

"(5.) All matters to be determined by the majority of all the directors for the time being shall be determined by resolution to be submitted to meetings of the directors in Kimberley and London to be convened in the usual way, at which the votes of those present and voting shall be recorded, and the decision arrived at shall be in accordance with the vote of the majority thus ascertained, notwithstanding that any director whether in Kimberley or London may be absent or abstain from voting. On any vote taken under this by-law no person appointed by any life governor his alternative director" (see art. 85) "shall vote if the life governor appointing him votes,

and if in fact both a life governor and his alternative should vote the vote of the alternative shall not be counted.

"(6.) Except as before provided, a quorum of the directors" (see art. 107) "sitting in Kimberley and a quorum of the directors sitting in London shall have in all respects equal and concurrent authority, including authority to incur expenditure not exceeding 25,000*l*.

"(7.) These by-laws shall continue in force until repealed or varied by a majority of all the directors for the time being."

11. The chairman of the appellant company attended meetings of the directors in London when important business was to be transacted or the policy of the board determined, as appears from minutes of the board meetings dated April 17, May 1, 15, and 17, June 17 and 19, 1889; February 10 and 17, 1891; April 13 and 20, October 26 and 28, November 2, and December 7 and 14, 1892; November 28, 1894; January 23, 1895; February 24 and March 3, 1897; May 4 and 11, 1898; January 25 and 27, May 3 and 10, June 14 and 28, 1899; April 9, 18, and 20, 1900; July 26 and October 9, 1901; and January 8 and 15, 1902.

The meetings of directors in London which have been attended by the general manager, who during the last few years has been resident in South Africa for six months of the year and for six months in England, are as follows—namely, seven meetings in 1898, five in 1900, ten in 1901, and twelve in 1902.

In each of the years 1900 and 1901 there was, including three life governors, a total of nineteen directors. In each of these years sixteen of the said directors at one time or another attended meetings of directors in London.

Two of the three life governors and nine of the sixteen ordinary directors were resident in the United Kingdom. Two of the remaining directors travel to and fro between England and Africa. The Right Honourable Cecil J. Rhodes, chairman, and six ordinary directors were resident in the Cape Colony. One director had a residence in each country.

The highest attendance at any board meeting in London was fifteen. The highest attendance at any board meeting in

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Kimberley was eight, but included three persons acting as alternatives, appointed under the articles of association, as representing life governors, when those life governors were absent from Kimberley. The average attendance of ordinary directors at the London meetings was largely in excess of the average attendance at the Kimberley meetings.

12. The evidence shewed that matters falling within the terms of clause 3 of the by-laws were always dealt with at meetings of the directors in London, where the majority of all the directors always was. Matters of policy within the said clause were discussed and approved and then communicated to Kimberley. There is no instance of the vote of the Kimberley directors turning a minority in London into a majority or negativing the decision of the London board. It was admitted that the majority of the directors had always given their votes in connection with any important matter to be determined under by-law 5 at the meetings of directors in London.

The directors meeting in London have appointed four committees, namely, (*a*) the finance committee, (*b*) the diamond committee, (*c*) the machinery committee, and (*d*) the dynamite committee, to act in London and to deal with matters falling respectively under such headings; and these committees have been continued to the present time. To the finance committee, first appointed on November 21, 1888, was entrusted (inter alia) the final carrying out of the scheme for consolidation and conversion of the company's debentures, under which 3,500,000*l.* of 5 per cent. first mortgage debentures was issued in London in 1894; and the minutes shew that the committee is required to make weekly reports to the directors in London as to the finances of the company, including the payment and discounting of bills. Accounts were submitted shewing the total receipts and payments through the London office for each of the years ended June 30, 1900, and June 30, 1901, as follows: Year ended June 30, 1900—receipts, 5,700,674*l.* 2*s.* 10*d.*; payments, 5,663,758*l.* 13*s.* 4*d.* Year ended June 30, 1901—receipts, 3,700,858*l.* 7*s.*; payments, 3,738,487*l.* 10*s.* 6*d.*

The diamond committee was first appointed in June, 1889, and under its direction and control the company's diamonds

received in London were arranged to be disposed of. From 1890 the committee were required to report at the weekly meetings of directors in London the sales of all diamonds, and from 1894 they submitted for the approval of the directors in London the terms under which the company's production of diamonds was disposed of to the diamond syndicate in London, which took over in Kimberley the whole produce of the mines and paid for it by bills on members of the syndicate in London under the contracts already mentioned in paragraph 6.

The machinery committee, first appointed on December 5, 1888, executes in London all orders from Kimberley for the purchase of machinery and plant for the company's use, the directors meeting in London having by minute of November 28, 1888, called upon the directors at Kimberley to pass all such orders through the London office. The machinery committee acts only on requisitions from Kimberley, and never initiates any policy relating to machinery. Their function is control. The accounts of the London office for the years ended June 30, 1900, and June 30, 1901, shew goods and sundry payments to the amount of 178,372*l.* 10*s.* and 151,967*l.* 1*s.* 3*d.* for each of the years mentioned respectively, and these sums are almost entirely in payment of orders received from Kimberley. The materials are passed by the London machinery committee, who engage the services of an expert to advise them in relation thereto.

The dynamite committee accepted tenders and made contracts for the purchase of dynamite. On September 14, 1898, this committee accepted a tender from Nobel's Explosives Company for two years from April 1, 1899. The payments made under the direction and by order of this committee through the London office in connection with explosives during the year ended June 30, 1900, amounted to 33,046*l.*, and for the year ended June 30, 1901, to 30,703*l.* All orders are in pursuance of requisitions from Kimberley. The dynamite committee never initiates any policy relating to dynamite. Their function is control.

In addition to the above transactions, various other transactions of considerable magnitude were considered, arranged,

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and carried out by the directors in London and the said committees.

13. Evidence was given from the minutes shewing that the directors meeting in London carried through (inter alia) the following important financial and other transactions: The final approval and sealing with the common seal of the company in October, 1889, of an agreement for purchasing the property and undertaking of the Bultfontein Consolidated Mining Company; also of the Pullinger Company in June, 1889; the arrangement and approval in May and June, 1899, of the purchase of the London and South African Exploration Company and the Kimberley Diamond Mining Company, and the approval and sealing with the common seal of the company of the agreement for that purpose; the appointment of a committee to settle the purchase of the New Bultfontein Company; the approval and sealing of various agreements with other companies; the consolidation and conversion of the company's debentures of 3,500,000*l.* in May and June, 1894. From July to November, 1901 (the then life governors being in London), the directors in London considered and finally arranged for the commutation of the life governors' profits, and for the distribution of a bonus of 400,000*l.* to shareholders on account of accumulated profits. In connection with these transactions it was arranged that the then existing capital should be increased from 3,950,000*l.* to 4,000,000*l.*, each of the 5*l.* shares being divided into two shares of 2*l.* 10*s.*, one of which was designated a preference and the other a deferred share. The directors in London also arranged for an increase of the capital of 4,000,000*l.* to 4,500,000*l.* by the creation and issue of 200,000 deferred shares of 2*l.* 10*s.* each. It was shewn that the directors were empowered under the articles of association to increase the capital of the company by the creation of new shares up to one-sixth of the nominal capital of the company for the time being; but the directors in London, acting under legal advice, required the agreement with the life governors and the respective increases of capital before referred to to be submitted to the shareholders at an extraordinary general meeting at Kimberley on December 23, 1901.

In all these cases it was stated in evidence that the transactions were always subject to confirmation at Kimberley; but this is only true in the sense that the majority of the directors did not use their power as such majority without formal communication with their colleagues in Kimberley. It was admitted that an absolute majority of all directors, if present in London, could not have been overruled by the directors at Kimberley, and, further, that as a matter of fact no conflict ever arose, everything decided at meetings in London at which the Right Honourable Cecil J. Rhodes was present being accepted without demur. No case was shewn in which the directors in Kimberley ever overruled the decision of the directors in London.

On May 14, 1902, the directors in London (eleven directors being present) unanimously appointed one L. L. Michell chairman of the company's directors from July 1, 1902, and resolved to send the following telegram to Kimberley: "Board unanimously appoint Michell chairman from July 1 next for five years, subject to his annual re-election as director. Terms not finally settled yet. Please pass special resolution and cable confirmation. We will make special announcement here." On hearing this telegram read the directors in Kimberley on May 14 resolved that L. L. Michell should be appointed chairman of the company from July 1 next for a period of five years, subject to his annual re-election.

14. The following minutes shew the relation between the directors in London and the directors in Kimberley: "June 3, 1890. Kimberley board called upon to rescind resolutions and purge the minutes of meeting of April 30, when two directors only were present, 'the other two gentlemen being alternatives of directors'"—scil. life governors—"'acting in London.'" "June 24 and July 22, 1891. Independent auditor appointed by London directors." "January 21, 1892. Unanimously resolved that this board do not approve of the advances made to the Chartered Company, and urge their Kimberley colleagues to use their best endeavours to obtain the earliest repayment of these advances, and not to sanction any more." "May 31, 1892. It was proposed by Mr. Atkinson, seconded by Mr. C.

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Meyer, and carried unanimously, that the board select a first-class accountant to proceed to Kimberley to take charge of the company's accounts as chief accountant, to be directly responsible to the directors." "November 28, 1894. It was resolved that having heard the explanation of Mr. Rhodes . . . . the directors in London agree to leaving the distribution of this sum (a profit of about 9000*l.*) in the hands of Mr. Rhodes . . . . on the understanding that Mr. Rhodes will render an account to the board at the end of the financial year, as previously proposed by the directors in Kimberley." "June 2, 1896. The secretary was directed to write to Mr. Oats expressing the opinion of the board as to the necessity of strengthening the board in Kimberley, and inquiring if it would be convenient to him to proceed to Kimberley at an early date." "September 30, 1896. Resolved to send the following cable to Kimberley: 'We have received your cables of September 24 and 26. This board is of opinion that you exceeded your authority. They most decidedly object to purchase for many reasons, and A. Beit will telegraph to C. J. Rhodes to-day, advising withdrawal purchase till C. J. Rhodes arrives home. Thirteen directors present." "July 7, 1897. It was resolved that the London board see no reason for acquiring an interest in the Dundee coal properties, and unanimously decline to confirm. This resolution to be telegraphed to Kimberley to-day."

[On further representation, however, the London board of directors subsequently did confirm the proposal.]

"May 3, 1899. Resolved that the authority given by the by-laws to the Kimberley board (with the approval of Mr. Rhodes) should be increased to 100,000*l.* instead of 75,000*l.* as it is now; such amount not to be expended more than once in every year without the confirmation of the London board." "July 3, 1901. The secretary was directed to ask for information about the farm referred to in the Kimberley minutes of May 30, and why an offer was made for it."

15. With regard to the general meetings of the company, evidence was given that they had always been held in Kimberley.

The general accounts of the company are kept at Kimberley, and balance-sheets, including the audited returns of the London office, are first drawn up there and then submitted to all the directors for approval. Evidence taken from the minutes shews that the directors in London, who have always been a majority of the board, exercise a controlling influence over these accounts.

It is shewn by the minutes that the dividends, which must under the Acts be declared by the directors but which are always announced in Kimberley and London simultaneously, were arrived at as the result of communications between the directors in London and Kimberley, the dividends being suggested from either side.

16. The appellant company contended that it was not resident within the United Kingdom, and that it did not exercise any trade within the United Kingdom, and was not subject to assessment to income tax under the Income Tax Acts.

17. On behalf of the Revenue it was contended that the operations of the company were controlled from London by the directors here; that London was the real seat of its business regarded as a whole; and that the company was resident here, and liable to assessment under s. 2 of the Income Tax Act, 1853, on the whole profits wherever made.

It was further contended as an alternative that, as the whole produce of the mines of the appellant company had been habitually disposed of under contracts made in England with the diamond syndicate in the manner and to the effect hereinbefore mentioned, the appellant company exercised a trade or business within the United Kingdom, and was chargeable to income tax on the whole of the profits made by them from the sale of the produce of the said mines under the said contracts.

18. The Commissioners having heard counsel on behalf of the appellant company and the inspector of taxes for the Inland Revenue, and having taken into consideration the facts set forth and certain other evidence adduced before them, came to the conclusion—(1.) That the trade or business of the appellant company constituted one trade or business, and was carried

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on and exercised by the appellant company within the United Kingdom at their London office. (2.) That the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company both in the United Kingdom and elsewhere were in fact controlled, managed, and directed.

19. The Commissioners determined that the appellant company was a person residing in the United Kingdom, and was liable as such to be assessed under s. 2 of the Income Tax Act, 1853, Sched. D, paragraph 1 (1), on the whole of the annual profits or gains arising or accruing from its trade whether the same was carried on in the United Kingdom or elsewhere, and accordingly confirmed the said assessments.

The appellant company thereupon expressed their dissatisfaction with the determination of the Commissioners as being erroneous in point of law, and duly required them to state and sign a case for the opinion of the High Court of Justice, which they accordingly stated as above.

April 12. *Cohen, K.C.* (*Danckwerts, K.C.*, and *Felix Cassel* with him), for the appellant company. The first question is whether this company resides in the United Kingdom. There is another and a different question—namely, whether it exercises a trade within the United Kingdom. A company may reside in one country and exercise a trade in another; it may reside abroad and exercise a trade in the United Kingdom: *Attorney-*

(1) By s. 2, Sched. D, of the Income Tax Act, 1853, the duties are made payable "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains:

"And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains: . . . ."

General v. *Alexander* (1); or reside in the United Kingdom and exercise a trade abroad: *Cesena Sulphur Co.* v. *Nicholson* (2); *San Paulo* (*Brazilian*) *Ry. Co.* v. *Carter*. (3)

The appellant company is incorporated abroad; its head office is abroad; its mines are abroad; and the whole of its work is done abroad. A company incorporated abroad does not reside in the United Kingdom—*Attorney-General* v. *Alexander* (1)—unless either it exercises a trade in the United Kingdom in its own person and without the services of agents: *Erichsen* v. *Last* (4); *Wingate* v. *Inland Revenue* (5); or its head office is in the United Kingdom: *Goerz & Co.* v. *Bell*. (6) Further, the general meetings of shareholders of this company are all held abroad. To make such a company liable to pay income tax in the United Kingdom on all its profits would work an injustice like that indicated by Lord Herschell in *Colquhoun* v. *Brooks*. (7)

A company incorporated by the laws of a foreign country has no legal existence in this country. It owes its existence to the laws of the foreign country, and it is only by international comity that its existence is recognised outside the country of its incorporation: *Blackstone Manufacturing Co.* v. *Inhabitants of Blackstone* (8); *Bank of Augusta* v. *Earle* (9); *Ohio and Mississippi Railroad Co.* v. *Wheeler*. (10)

Secondly, this company does not exercise any trade within the United Kingdom. Its only source of profit in this kingdom is derived from entering into a contract once a year with a syndicate of diamond merchants in London. That contract is to be performed by the company in South Africa entirely, and not in the United Kingdom. A company must habitually enter into contracts during the year of assessment before it can be said to be exercising its trade: *Erichsen* v. *Last* (4), per Brett L.J.

A company incorporated in a foreign country, where alone

(1) (1874) L. R. 10 Ex. 20.
(2) (1876) 1 Ex. D. 428.
(3) [1896] A. C. 31.
(4) (1881) 8 Q. B. D. 414.
(5) (1897) 24 R. 939.
(6) [1904] 2 K. B. 136.
(7) (1889) 14 App. Cas. 493.
(8) (1859) 13 Gray (Mass.) 488.
(9) (1839) 13 Peters (U.S.) 519.
(10) (1861) 1 Black (U.S.) 286, 295, 297.

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the general meetings of its shareholders are held, at which alone its directors are annually elected and at which alone they can be removed, whose head office and seat are abroad, and whose powers can only be exercised by the joint operation of directors in London and abroad, cannot be said to be resident in the United Kingdom.

Sir R. B. Finlay, A.-G. (*S. A. T. Rowlatt* with him), for the Crown. The findings of the Commissioners in this case are conclusive in favour of the Crown, and there is ample evidence to support them. The fallacy in the argument for the appellant company is in supposing that this company is merely a mining company. It is much more. It is just as much a financial company as was the appellant company in *Goerz & Co.* v. *Bell.* (1) By contracts such as that of December 2, 1901, it controls the sale of diamonds all over the world, and that control, which is an essential and inseparable part of its trade, is exercised in London. Moreover, the majority of its directors has always been in London, and therefore it cannot be said that this company does not exercise a trade in the United Kingdom. But if it exercises a trade here by its own officers, and not merely by agents, it must reside here. In *Goerz & Co.* v. *Bell* (1) Channell J. held that a financial company, such as the appellant company, resides where its head office is situate; but such a company may have more than one residence. Cases relating to the service of writs, though not directly in point, furnish close analogies to this case. Such cases are *Haggin* v. *Comptoir d'Escompte de Paris* (2) and *Compagnie Générale Transatlantique* v. *Law; La Bourgogne.* (3) The question where a company resides is mainly a question of fact. The place of its incorporation or registration is one circumstance, but only a circumstance, to be taken into account: *Cesena Sulphur Co.* v. *Nicholson.* (4)

Cohen, K.C., in reply. The place where a company resides cannot depend upon the question where the majority of its directors may happen to be at any particular time. The

(1) [1904] 2 K. B. 136.
(2) (1889) 23 Q. B. D. 519.
(3) [1899] A. C. 431.
(4) 1 Ex. D. 428.

judgment of Channell J. in *Goerz & Co.* v. *Bell* (1) is in favour of the appellant company.

Cur. adv. vult.

April 17. PHILLIMORE J. read the following judgment:— This is an appeal against two assessments made by the Commissioners for the general purposes of the Income Tax Acts for the City of London, one for the year ending April 5, 1901, and the other for the year ending April 5, 1902, each in the sum of 1,557,693*l.*, in respect of the profits of the appellant company in the United Kingdom and elsewhere.

The appellant company was not incorporated in the United Kingdom; it derives its existence from a deed of settlement registered at Kimberley under the Cape Colony Act No. 4 of 1861, to which the further benefit of incorporation became attached by the Cape Colony Act No. 13 of 1888. It has nevertheless been found by the Commissioners to be "resident within the United Kingdom and liable as such to assessment for profit or gains accruing from its trade whether carried on in the United Kingdom or elsewhere" under the first paragraph of Sched. D of the Income Tax Act, 1853. The material facts upon which the Commissioners decided are set out fully in great detail, and with reference to many documents, in the case, which then concludes with the following paragraphs: "The Commissioners, having . . . . taken into consideration the facts above set forth and certain other evidence adduced before them, came to the conclusion (1.) that the trade or business of the appellant company constituted one trade or business and was carried on and exercised by the appellant company within the United Kingdom at their London office; (2.) that the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company both in the United Kingdom and elsewhere were in fact controlled, managed, and directed. 19. The Commissioners determined that the appellant company was a person residing in the United Kingdom, and liable as such to be assessed under s. 2 of the Income

(1) [1904] 2 K. B. 136.

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Bray, J.

TAX ACT, 1853 (Sched. D., paragraph 1, on the whole of the annual profits or gains arising or accruing from its trade, whether the same was carried on in the United Kingdom or elsewhere, and accordingly confirmed the said assessments." The way in which the Commissioners have stated their conclusions of fact is more absolute than that in which they stated their conclusions in the somewhat similar case of *Rodick, Ld. v. Clark* (1); but it was contended by counsel for the appellant company, and not disputed by counsel for the Crown, that the intention of the case was that I should look at all the facts with a view to seeing whether the findings of the Commissioners were warranted, and without being fettered by their conclusions, although I must of necessity attach great weight to them. This course was taken by my brother Channell in *Gourd & Co. v. Bull* (2), and the counsel for the Crown agreed that I might rightly take it in the present case.

There is, as I have said, no doubt that this company owes its existence to its colonial incorporation, and that the corporate existence of foreign corporate bodies is only recognised in other countries by international comity. I doubt whether the same principle applies to colonial as to foreign corporations. Probably every corporation which has legal existence by virtue of an Act of the Sovereign Power exercised in any part of His Majesty's dominions should be recognised as a corporation in every Court of His Majesty's dominions. But, be this as it may, a foreign company, and certainly none the less a colonial company, may be treated by English Courts as existing, and as existing in this country, for the purposes of taxation. The language of Baggallay L.J., giving judgment in the two cases of *Calcutta Jute Mills Co. v. Nicholson* (3) and *Cesena Sulphur Co. v. Nicholson* (3), the inquiry entered upon by the Court of Session in *Wimpey v. Inland Revenue* (4), and the decision of my brother Channell in *Gourd & Co. v. Bull* (2), shew that this is the case. It was the taxpayer who in *Calcutta Jute Mills Co. v. Nicholson* (3) and *Cesena Sulphur Co. v. Nicholson* (3) con-

(1) [1905] 2 K. B. 450; [1905] 1 K. B. 305.
(2) [1904] 2 K. B. 196.
(3) 1 Ex. D. 428.
(4) 24 R. 930.

tended that his company, though incorporated in England and having an office here, was not residing within the United Kingdom—a contention which in the particular form of those cases failed. As then a company, though incorporated abroad, may be deemed to be residing within the United Kingdom for the purposes of the Income Tax Acts and vice versâ, it remains to consider whether this company is notwithstanding its colonial incorporation, so resident.

Now the case is one of much detail. I have attended to all the considerations urged upon me, but in this judgment I only profess to give the main ones. The company relies upon its incorporation, upon its head office being in Kimberley, upon general meetings of shareholders being always held in Kimberley, upon some of the directors meeting weekly in court-board meetings at Kimberley, upon the by-laws Nos. 2 and 3 requiring matters of grave importance to be submitted to meetings of directors to be held at Kimberley and in London, and upon the fact that the main industry of the company (which is the mining of diamonds) is entirely carried on in the Cape Colony.

The Crown relies on the facts that four at least of the directors must reside in England, that weekly court-board meetings have been held in London, that for the larger proportion of the directors have attended the London court-board meetings, so much larger a proportion that, whenever it has been necessary to add up the votes of the directors, the scale has never been turned by the Kimberley vote, that four committees sit and act in London, of which the finance committee and the diamond committee deal with the most important operations of the company, and, lastly, that a large portion of the company's profit is earned by the judicious mode in which they regulate the sale of their diamonds and control the diamond market throughout the world by common made and carried into effect in the United Kingdom.

Upon a review of these various considerations I should come to the conclusion, if it was necessary to find that the company had one residence, and one residence only, that its residence was within the United Kingdom, where the business of control is carried on, even though its principal physical labours are

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abroad, as was the case in *San Paulo (Brazilian) Ry. Co.* v. *Carter*. (1)

But I do not think it necessary to determine that the only residence of the company is in the United Kingdom. As was pointed out in *Goerz & Co.* v. *Bell* (2), a person and a company may have for the purposes of taxation two residences. So a company may have two residences for the purpose of answering to justice: see *Compagnie Générale Transatlantique* v. *Law; La Bourgogne*. (3) I am satisfied that this company has existence and residence within the United Kingdom. It is from London that the policy and the important operations of the company are directed. It is in London that the governing work of the company is done, and where the principal officers of the company meet in greatest numbers and consult and determine its business.

I have one further observation. It is clear that, even if this company be not resident within the United Kingdom, it exercises a trade within the United Kingdom in respect of the profits of which it would be liable to assessment; to a certain extent—namely, in respect of profits derived under the agreement of December 2, 1901, this was admitted by counsel for the company, but this admission by no means reaches to the extent of the company's liability. At one time I thought that this of itself was conclusive against the appellant company upon the principles stated towards the close of the judgment in *Goerz & Co.* v. *Bell*. (4) The company has to pay on the profits of its trade within the United Kingdom; if it is non-resident, it is assessed and pays by its agent in this country, but it has no such agent. It is its own agent, and must itself be assessed and pay. This argument, as I have said, I at one time thought conclusive. But I am not sure upon reflection that it is conclusive as to the whole assessment, because the assessment is upon profits earned, not only in the United Kingdom, but elsewhere. To support the full assessment the company must be determined to be resident within the United Kingdom, and I so determine. I have considered the case of

(1) [1896] A. C. 31.
(2) [1904] 2 K. B. 136, at p. 146.
(3) [1899] A. C. 431.
(4) [1904] 2 K. B. 136, at p. 151.

the *Attorney-General* v. *Alexander*. (1) I do not think that my decision conflicts with it. Throughout the case I have been assisted by the judgment in *Goerz & Co.* v. *Bell* (2); but I admit that the facts were stronger in that case than in the one before me, and that my judgment may be considered as going somewhat further.

The appeal must be dismissed.

Appeal dismissed.

A. P. P. K.

The company appealed.

June 2, 7. *Cohen, K.C.*, and *Danckwerts, K.C.* (*Felix Cassel* with them), for the appellants.

Sir R. B. Finlay, A.-G., and *Rowlatt* (*Sir E. H. Carson, S.-G.*, with them), for the Crown.

The arguments were substantially to the same effect as in the Court below.

[The following authorities were cited in addition to those cited in the Court below: *Grainger & Son* v. *Gough* (3); *Sulley* v. *Attorney-General* (4); *Alivon* v. *Furnival* (5); *Gilbertson* v. *Fergusson* (6); *Ex parte Breull.* (7)]

COLLINS M.R. This is an appeal from a judgment of Phillimore J. holding that the appellants were liable to income tax under the terms of Sched. D. Those terms are as follows: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and

(1) L. R. 10 Ex. 20.
(2) [1904] 2 K. B. 136.
(3) [1896] A. C. 325.
(4) (1860) 5 H. & N. 711.
(5) (1834) 1 C. M. & R. 277; 40 R. R. 461.
(6) (1881) 7 Q. B. D. 562.
(7) (1880) 16 Ch. D. 484.

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gains; and for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains." The learned judge has held that the appellant company is resident in the United Kingdom, and also that it exercises a business in the United Kingdom; and that, on either of these grounds, the company is liable to be assessed to income tax under Sched. D on the profits of that business. The really important question, according to the appellants' counsel, is whether the company can be said to be resident in the United Kingdom. The Attorney-General does not admit that this question is of the supreme importance ascribed to it by the appellants. He says that, from the standpoint of the Crown, if the company exercises its business in the United Kingdom, the result is that, under the special circumstances of the case, the position is the same with regard to income tax as if the company were resident in the United Kingdom; because, he contends, the business of the company is one entire business which is exercised in this country: so that, in either view of the case, whether the company is resident in England or not, the Crown is entitled to the income tax claimed, as there is only one business which is carried on by them in the United Kingdom. I propose to deal shortly with both points. The question, as regards both points, appears to me to depend on the inferences of fact to be drawn in this case, and, subject to one point, there does not appear to me to be really any dispute as to the law applicable.

As regards the first point, namely, whether the company is resident in England or not, the appellants' counsel meets that in limine with a proposition of law, and, relying on certain American authorities, affirms that a corporation can have no residence outside the sovereignty of the country wherein, and under the laws of which, it is incorporated. He bases that proposition on dicta to be found in the American cases which

he cited—namely, *Blackstone Manufacturing Co.* v. *Inhabitants of Blackstone* (1); *Bank of Augusta* v. *Earle* (2); *Ohio and Mississippi Railroad Co.* v. *Wheeler*. (3) When those dicta come to be considered with reference to the points raised in these cases, and certain qualifications appended to them, I do not know that for the present purpose they amount to very much, or that they contain anything very inconsistent with the possibility of a corporation residing in a country other than the country in which it is incorporated, to the extent at any rate of bringing it within the jurisdiction, and making it amenable to all the laws of that country. For, though the learned judges who uttered those dicta seem to consider that a corporation can, in point of law, have only one domicil and residence, namely, within the sovereignty of the country from which it derives its existence, they go on apparently to qualify that view by saying that it is possible for it to carry on business in another country, which possibility they derive from the comity of nations. Whether it rests on comity or on the view that, a corporation being an entity, that entity is legally capable of existing within a jurisdiction other than that of the country which gave it birth, the result is that it can carry on business in a country other than that in which it was incorporated. However this may be in American law, it seems to me clear that by the law of this country a foreign corporation is capable of residing in this country. In *Carron Iron Co.* v. *Maclaren* (4) Lord St. Leonards laid it down that a corporation can have more than one domicil. He said: "I think that this company may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domicils. Its business is necessarily carried on by agents, and I do not know why its domicil should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purposes of jurisdiction, properly be deemed the domicil. The corporation cannot have the benefit of its place of business

(1) 13 Gray (Mass.) 488.
(2) 13 Peters (U.S.) 519.
(3) 1 Black (U.S.) 286.
(4) (1855) 5 H. L. C. 416, at pp. 449, 458.

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here without yielding to the persons with whom it deals a corresponding advantage. The claim of the company is in respect of dealings here. Service on one member of a corporation is good service. Upon general reasoning, I think that the company may, for the purposes of the suit in Chancery, be treated as within our jurisdiction." And further on he said: "I have been unable to discover which is the particular residence of this company. The money of the appellants is made by returns coming from England. They manufacture in Scotland. The members of this corporation do not make the iron; they do not reside in the house. They are nobody; in fact, they are represented by their seller, but they are not, in other respects, persons dealing as individuals. Their business is carried on in London just as much as it is carried on in Scotland. It is not, therefore, a question of attacking the agent as agent. If the service upon the agent is right, it is because, in respect of their house of business in England, they have a domicil in England. And in respect of their manufactory in Scotland, they have a domicil there. There may be two domicils and two jurisdictions; and in this case there are, as I conceive, two domicils and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business one is as much the domicil of the corporation as the other."

It seems to me that what was there said points to the conclusion that it is possible according to our law for a foreign company to acquire a residence in this country; and, although it may be said that the passages which I have cited were only dicta of Lord St. Leonards, and not an actual decision of the House of Lords, they appear to have been followed in other cases with regard to the service of writs on foreign corporations. It is necessary to consider what lies at the bottom of these cases as to service, in order to see how far they are consistent with the high and dry position taken up by the appellants' counsel with regard to the impossibility of a foreign corporation acquiring a residence in this country. In those cases the question was whether, under the particular circumstances of the case, a foreign corporation could be made amenable to the

jurisdiction by service of a writ upon it, not out of, but within the jurisdiction. It was necessary, in order to establish the right to treat the foreign corporation as within the jurisdiction, to bring it within the law applicable to residents in this country. Those cases arose under Order IX., r. 8, which provides that, "in the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation." The first step which had to be taken was to decide that the rule covered a foreign as well as an English corporation. Then, in dealing with the question whether such a corporation was properly served, it became necessary to consider whether it was resident in this country. Hence those cases were certainly decided on the view that the particular corporation in question was resident in this country when the writ was served. It may be, no doubt, that a residence which would be sufficient for the purposes of service would not be such as to bring a foreign corporation within the operation of a taxing Act; but the cases do appear to strike at the root of the proposition that it is legally impossible for a foreign corporation to be resident in this country. They are certainly, I think, authorities against the existence of a hard and fast line confining the residence of a foreign corporation to the country in which it is incorporated.

Assuming that it is possible for a foreign corporation to acquire a residence in this country, it becomes, in my opinion, really a question of fact whether under all the circumstances it can be deemed to have acquired such a residence. The question is as to the inference to be drawn from many facts. I do not propose to go through all the details of this case. Phillimore J. has given his opinion upon a general examination of the facts, and I agree in the conclusion at which he arrived. I will state, however, a few of the considerations which lead me to the conclusion that the appellant company must be deemed to be resident in this country. Turning to the articles of association, art. 3 provides that "the head office of the company shall be

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in Kimberley, in the Cape Colony, or at such other place either in the said Colony or in such other country as the directors shall from time to time consider advisable." That is a very remarkable provision, if it is to be presumed that the company is incapable of residing in any country other than the Cape Colony. It certainly shews that it was not the intention that the residence of the company should be limited to the sovereignty of the country from which its existence was derived, but that there should be power to shift the residence of the company to another country. I do not say that the locality of the head office would be conclusive to shew where the company resided; but, assuming it to be so, inasmuch as the article shews that the intention was that it might be shifted from the Cape Colony to another country, we are justified in looking to see what has been done in fact, before drawing any inference from the mere fact that the head office was by the article stated in the first instance to be at Kimberley. We find that an office was established in London, and that, throughout the period in question, a majority of the directors resided in the United Kingdom; and, although certain directors had to reside in South Africa, a quorum must always reside in England. There are a series of findings of fact all tending to shew that the real business of the company was conducted in England, though in concert with the directors in Kimberley. As I have said, the majority of the directors resided in the United Kingdom, and they appear to have been the persons who really exercised the effective control of the undertaking. In paragraph 13 of the case it is stated as follows: "In all these cases it was stated in evidence that the transactions were always subject to confirmation at Kimberley; but this is only true in the sense that the majority of the directors did not use their power as such majority without formal communication with their colleagues in Kimberley. It was admitted that an absolute majority of all directors, if present in London, could not have been overruled by the directors at Kimberley." It seems to me that the more one looks into the facts, the more clear it becomes that the provisions of the articles were so

framed, and so acted on, as really to enable the directors in London to manage the company. Now, when we come to look at what was really done under the management of the directors, it appears clear that the real business of this company was that of diamond merchants carrying on business in London. The material which they dealt in, no doubt, was drawn from South Africa, and certain members of the governing body had to be in Kimberley to superintend operations there; but, though that was so, the real business of the company, the business operations to which skill, and intelligence, and experience were most essential, were carried on in London. Provisions are made, by means of an annual contract, by which the whole produce of the appellants' mines is taken by a syndicate formed of different firms of diamond merchants in London, who by arrangement with the directors deal with the diamonds in London, the market on which the operations in the company's diamonds are conducted; and it is the skill and intelligence with which these provisions are made, and these operations are conducted, which enable the market to be controlled so as to allow the company to earn profits on a large scale. The head and brains of the company are, as it appears to me, to be found in London, and the real conduct of the adventure takes place there. It does not matter in my opinion whence the subject-matter with which the business deals is drawn; the inference which I draw from the facts is that the real business of the company is carried on in London.

It is not necessary to go through the cases to which we have been referred. With the exception of the dicta in the American cases to which I have alluded, I can find nothing in those cases at all inconsistent with the inference which I draw from the facts in the present case. The counsel for the appellants has pressed upon us an expression used by Lord Esher, then Brett L.J., in the case of *Erichsen* v. *Last* (1), as to the conditions in which a foreign company may be said to carry on a trade in England, and perhaps I ought to say a few words on that subject. In that case Lord Esher said: "I should say

(1) 8 Q. B. D. 414.

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that, wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for, or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." The appellants' counsel said that, assuming that passage to represent the law applicable to such cases, the conditions there mentioned were not fulfilled in the present case. He fastened on the word "habitually," and argued that there was nothing in the present case in the nature of an habitual making of contracts by the appellant company in this country, inasmuch as they only made one contract annually for the whole of the produce of their mines. I do not think that there is any substantial difference between making one contract annually to govern all the transactions throughout the year, and making a series of similar contracts in the year dealing with each transaction in succession separately.

Dealing with the questions of residence and where the business was carried on together, I think that the business of the company was really one business, and that the essential parts of that business were conducted in London; and, having regard to the fact that the company had a local habitation in London, which, though not named the head office, really was in effect the head office, I think it resided in London. For these reasons I think the decision of Phillimore J. was right and this appeal must be dismissed.

MATHEW L.J. I am of the same opinion. It is important for the purposes of this case to consider what was the real character of the appellants' business. It was one business—namely, first to dig for diamonds in Africa, and then to secure the sale of them on the London market under such conditions as to enable the company to obtain the control of the market for diamonds. The mining operations in Africa were superintended by a small number of the directors, and the majority of the directors resided and held their meetings in the United

Kingdom. No profits were made in Kimberley or diamonds sold there; the object of the directors was to secure the sale of the diamonds in England, and all the provisions made by the company were directed to that end. The question is, having regard to all the circumstances, where the company can be said to reside. The appellants' counsel contended that a company can only reside in the country where it was incorporated, that its powers cease, and its existence ends, when once the boundaries of that country are passed; and they relied on certain American cases to establish that proposition. When these cases are looked at, they only appear to indicate the existence of an opinion on the part of some American lawyers of a somewhat technical nature—namely, that in legal theory corporations cannot have any existence outside the boundaries of the country in which they are incorporated; but that theory appears practically to have but little substance in it. It cannot be disputed that a foreign corporation can sue and be sued in this country, and can enforce contracts here; and it is every day's experience that foreign companies carry on business here quite as effectively as if they were incorporated in this country. It seems impossible to contend under these circumstances that they do not reside where they so carry on business, or that their existence must be treated as confined to the country of their incorporation. The practice of business and of the law appears quite inconsistent with such a view. It is clear from the cases that under the rules a foreign corporation may be served with a writ in this country. The question in such cases is whether the corporation resides within the jurisdiction; and, whenever it is found to be occupying by means of its officers premises in this country, its residence here would seem to be established for purposes of service. It appears to me that the contention of the appellants' counsel on this point wholly fails, and that a foreign corporation may reside in this country for the purposes of income tax. I do not enter on the question whether this colonial corporation is for the present purpose a foreign corporation in the strict sense of the term or not. I will assume that

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it is; but, even so, the law seems to me clearly to be that it may exist outside the country in which it was incorporated, and may reside here.

That being so, the question is, Does the appellant company reside or carry on business in this country? I think there can be only one answer to that question. As I have said, the part of the business carried on in Africa was mining only, and no profits were made there. Arrangements were made for dealing with all the diamonds produced by the appellants' mines through a syndicate in London, and the diamonds sold to the syndicate appear to have been paid for by bills drawn on members of the syndicate in London. A most important department of the business was that of finance, and the company derived all the funds necessary for the operations in Africa from London. A great deal was made of the fact that dividends were declared in Kimberley; but it appears that, before their declaration there, the amount of the dividend is arranged in the London office, and then the dividend is declared simultaneously in London and Kimberley. It seems to me impossible on the facts to treat the company otherwise than as carrying on business in this country; and the inference which I draw is that the seat of authority over the affairs of the company was in England, there being a preponderance of directors here, who could and did in fact control the operations of the company abroad.

COZENS-HARDY L.J. I agree, and have very little to add. It cannot be doubted, I think, that the appellant company might be served with a writ in an action in this country. If so, that must be because in the view of the Court they would be resident in this country, having an office here which they occupy by their directors. In the case of *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (1), that point was very clearly put by the Master of the Rolls. He said that according to the cases "the true test in such cases is whether the foreign cor-

(1) [1902] 1 K. B. 342.

poration is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country. It can only so reside through its agent, not being a concrete entity itself, but if it so resides by its agent, it must be considered for this purpose as itself residing within the jurisdiction"; and in that case it was held that such a residence even for the period of nine days was sufficient for the purposes of service. I think it is not open to us to assent to the proposition urged by Mr. Cohen, namely, that it is impossible for a corporation ever to be resident anywhere except in the country in which it was incorporated. No doubt its residence in this country might be so temporary that, though sufficient for the purposes of service, it might not be sufficient to render the corporation liable to the operation of the laws relating to taxation. But I agree with the view expressed by the Master of the Rolls to the effect that the principle laid down in the cases as to service is really conclusive against the proposition put forward by Mr. Cohen. In answering the question whether a company resides in this country, which is a mixed question of law and fact, the place where it is incorporated forms no doubt one element for consideration; but all the circumstances must be considered. The question cannot depend on what the company chooses to call its head office. One must look at facts and not mere terms. I find in the present case that a clear majority of the directors reside in the United Kingdom, and all questions of policy appear to be dealt with by them in London. All important contracts by the company would appear to be sealed in London. So far as our information goes, the seal of the company would appear to be kept in London and to be there affixed to documents requiring to be sealed by the order of the directors. In considering where the brain, heart, and motive power of the company are situated, all the important elements in the case appear to me to shew that they are to be found in London, and not in Kimberley. For these reasons I think that the decision of Phillimore J. was correct. Furthermore, I think that it may also be supported on the ground that, wherever the company may be resident, it exercises a trade in this country. The

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business of the company appears to me to be really one business, the essential part of which is carried on in London.

Appeal dismissed.

Solicitors for appellants: *Hollams, Son, Coward & Hawksley.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

NOTE.—EXTRACTS FROM ARTICLES OF ASSOCIATION.

By art. 1, "Life governors mean the permanent directors of the company during the term of their natural lives and of their proper qualification for office, as hereinafter set forth. 'Directors' mean the directors for the time being of the company, or such number of them assembled at a board as have authority to act for the company, and, save where the terms are used in opposition or distinction to each other, 'directors' shall include 'permanent directors' or 'life governors.' 'Board' means a meeting of directors duly constituted. 'Office' means the registered office of the company. 'Seal' means the common seal of the company."

Office of the Company.

Art. 3 (set out in paragraph 4, supra).

Objects of the Company.

By art. 4 the objects of the company were declared to be (inter alia), "(*a*) To acquire any houses, lands, mines, mining rights, water rights, and other rights and hereditaments, diamonds and other precious stones, gold and other minerals, and any other movable or immovable property in Africa or elsewhere. (*b*) To carry on the business of miners in all its branches, to search for, win, get, mine, quarry, crush, smelt, wash, roast, dress, calcine, refine, cut, polish, prepare for market, buy, sell, and deal in diamonds, gold ores, coal, and all other precious stones, metals, and minerals. (*c*) To acquire, construct, and manage any works or conveniences which the company may think conducive to its objects. (*d*) To be interested in and to promote such companies as may be considered conducive to the interest of the company, and to carry on any other business calculated to render the company's property or rights profitable. (*e*) To acquire the business of any company or person carrying on any business which the company is authorized to carry on, and to deal in the property, shares, or stock of any such person or company. (*f*) To enter into partnership or amalgamation with any person or company carrying on any business which the company is authorized to carry on, or any business capable of being carried on for the benefit of the company. . . . (*j*) To acquire by concession, grant, purchase, or otherwise any tract or tracts of country in Africa or elsewhere, together with such rights as may be agreed upon and granted by the rulers and owners thereof, and to expend such sums of money as may be deemed requisite and advisable in the development and maintenance of order and good government thereof; also to obtain rights over, construct, and regulate roads, railways, telegraphs, submarine telegraphs, waterways, docks, and har-

bours . . . . (*l*) To take all necessary and proper steps in the Parliaments, Legislative Assemblies, National Assemblies, or with the authorities, whether supreme, local, municipal, or otherwise of any place or country in which the company may have interests, or carry on operations for the purpose of directly or indirectly furthering the interests of the company. (*m*) To make, accept, indorse and execute promissory notes, bills of exchange, and other negotiable instruments connected with the business of the company. (*n*) To borrow money, or receive money on deposit at interest, or otherwise as the company may think fit, and in particular by the issue of debentures, debenture stock, or perpetual annuities, and in security of any money so borrowed to mortgage, pledge, or charge the whole or any part of the property, assets, or revenue of the company, present or future, including its uncalled capital, by special assignment or otherwise. (*o*) To lend, invest, or otherwise employ moneys belonging to or entrusted to the company upon securities and shares, and from time to time to vary such transactions. (*p*) With the unanimous consent of the life governors to sell or dispose of the undertaking or property of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures, and other securities of any other company having objects altogether or in part similar to those of this company. . . . (*s*) To procure the company to be registered as a limited liability company in any country where it may be deemed advisable so to do. (*t*) To open and keep a register in any country where it may be deemed advisable to do so, and to allocate any number of shares in the company to such register or registers. (*u*) To do all things that are incidental or conducive to the attainment of the objects of the company in any part of the world, either as principals, agents, contractors, or otherwise, and either in its own name or through trustees, agents, or otherwise, and either alone or in conjunction with others . . . ."

Transfer and Transmission of Shares.

Art. 20: "All transfers of shares shall be made by indorsement upon the certificate, and shall specify the person or persons to whom the same are transferred, or shall be by deed signed by both transferor and transferee, duly attested by two witnesses, and in such form as the board of directors may from time to time approve, and shall be deposited with the secretary, provided nevertheless that no such transfer by indorsement or deed shall be valid to transfer any interest in or right or title to any share or shares or any dividend, profit, or advantage therein or thereupon, until such transfer shall have been duly registered in the office of the company; provided also that in any case where a transfer of any share is intended to be effected out of this Colony, any person or persons duly empowered in that behalf by the board of directors shall transfer on the usual common form of transfer used by the members of the London Stock Exchange such share or shares into the name of the transferee, and any such transfers so given shall be as valid and effectual as if the same had been given by the secretary of the company; and provided also that the secretary or other person or persons so empowered as above shall not register any transfer of shares during a period of fourteen days immediately preceding any of the ordinary annual meetings of the company."

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Increase and Reduction of Capital.

Art. 39: "The company in general meeting may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient; provided, however, that the directors may without the intervention of any meeting increase the capital by creating new shares to such amount and under such circumstances as hereinafter set forth (see art. 119, post); and provided further, that save for the acquisition of new property there shall be no increase of capital without the consent of the life governors."

Art. 40: ". . . . If the creation of new shares be resolved upon by a general meeting they shall be issued upon such terms and conditions as the said meeting shall direct, and if no direction be given then as the directors shall determine. . . ."

General Meetings.

Art. 48: "All meetings of the company shall, until otherwise determined by the board, be held in Kimberley."

Art. 49: "The first general meeting shall be held at such time, not being more than fifteen months after the registration of these presents, as the directors shall determine."

Art. 50: "Subsequent general meetings shall be held once during the year following that in which the first meeting is held, and in each subsequent year at such time as the directors may determine."

Art. 51: "The above-mentioned general meetings shall be called ordinary general meetings; all other meetings of the company shall be called extra-ordinary general meetings."

Art. 52: "The directors may whenever they think fit, and they shall upon a requisition made in writing by not less than ten members holding not less than one-fifth of the nominal amount of the issued capital, convene an extraordinary general meeting."

Proceedings at General Meetings.

Art. 57: "The business of an ordinary meeting shall be to receive and consider the statement of income and expenditure, and the balance-sheet, the reports of the directors and auditors, to elect directors and other officers in the place of those retiring by rotation or otherwise, and to transact any other business which under these presents ought to be transacted at an ordinary general meeting."

Art. 58: "Ten members personally present or represented by proxy shall be a quorum for any general meeting. No business shall be transacted at any general meeting unless the requisite quorum be present at the commencement of the business."

Life Governors and Directors.

Art. 80: "There may be five life governors or permanent directors . . . . Each of the said life governors shall be and remain a director until his death, resignation, or disqualification, and no resolution at any meeting or anything whatsoever, save death, resignation, or disqualification, shall be capable of vacating the office or effecting the removal from the board of directors of the said life governors or any of them."

Four persons were named as the first life governors, and they had power to appoint a fifth. By Art. 82 the same four persons were appointed the first directors of the company, and they were given power to appoint such duly qualified persons as they should think necessary to act in conjunction with them as directors until the first ordinary general meeting of

the company, at which the directors so appointed were to retire.

Art. 83: "At the first ordinary general meeting the members shall determine how many directors besides the life governors there shall be, and they shall at such meeting proceed to elect such number as they determine to be necessary."

Art. 84: "Four at least of the directors shall reside in England."

Art. 85: "Any life governor, with the consent and approval of the majority of the other life governors, shall have the right and power at any time, if he thinks fit so to do, to appoint any person who shall be a shareholder to act as alternative director in his place and stead at all or any meetings of the directors at which he shall not be present."

Art. 89: "It shall be lawful for the shareholders at any ordinary general meeting to vote such sum out of the profits of the company to the directors other than the life governors, as remuneration for their services, as they may think fit. . . ."

Art. 98: "At each ordinary general meeting all elected directors shall retire from office."

Art. 99: "The company at any general meeting at which the directors retire shall fill up the vacated offices by electing a like number of persons to be directors, unless at such meeting it be determined to reduce or increase the number, in which case the company shall fill up the number so determined upon."

Art. 103: ". . . . The company in general meeting may by special resolution reduce the remuneration to be paid to elective directors."

Art. 104: "The company may by extraordinary resolution remove any director, not being a life governor, before the expiration of his period of office, and, if thought fit, may by like resolution appoint another person in his stead. . . ."

Art. 106: "The directors may from time to time entrust to and confer upon one or more directors such of the powers exercisable by the directors as they think fit. . . ."

Art. 107: "The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and may determine the quorum necessary for the transaction of business, and, until otherwise determined, four directors shall be a quorum."

Art. 109: "Questions arising at any meeting of directors shall be decided by a majority of votes, and in case of an equality of votes the chairman shall have a second or casting vote."

Art. 110: "The directors may elect a chairman and deputy chairman. . . . In the absence of the chairman the deputy chairman shall preside. If such officers have not been appointed, or if neither be present at the time appointed for a meeting, the directors present shall choose some one of their number to be chairman of such meeting."

Art. 112: "The directors may delegate any of their powers to committees consisting of such members of their body as they may think fit. . . ."

Powers of Directors.

Art. 118: "The management of the business and the control of the company shall be vested in the directors who, in addition to the powers and authorities by these presents expressly conferred upon them, may exercise all such power and do all such acts and things as may be exercised or done by the company, and are not hereby expressly directed or required to be done by the company in general meeting."

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By art. 119 the directors were expressly entrusted with power to acquire property for the company, to increase the capital up to one-sixth of the nominal capital, to declare dividends, to expend up to 10,000*l.* per annum on secret service, to found companies and acquire interests in them; to mortgage and charge the property of the company; to appoint and at their discretion remove such managers, secretaries, officers, clerks, agents, and servants as they might think fit; to open an agency or branch office for the company in London or elsewhere, and to appoint agents to represent the company for the issue and transmission of shares; to appoint persons to hold property in trust for the company; to institute, defend, or abandon any legal proceedings; to set aside out of the profits of the company any sum as a reserve fund; and from time to time to make, vary, and repeal by-laws for the regulation of the business of the company, its officers and servants, or the members of the company.

Local Management.

Art. 120: "The directors may provide for the management of the affairs of the company at such places and in such manner as they think fit."

Art. 121: "The directors may establish any local committee or agency for managing any of the affairs of the company abroad, or may appoint persons to be members of local committees and delegate to such persons any of their powers, other than the power to make calls."

Accounts.

Art. 132: "The directors shall cause true accounts to be kept of the sums of money received and expended by the company, and the matters in respect of which such receipts and expenditure take place and of the assets, credits, and liabilities of the company."

Art. 135: "At every ordinary general meeting the directors shall lay before the company a statement of the income and expenditure and a balance-sheet containing a summary of the property and liabilities of the company, made up to date, not more than three months before the meeting, from the time when the last preceding statement and balance were made."

Art. 136: "Every such statement shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount they recommend to be paid out of the profits by way of dividend or bonus to the members, and the amount, if any, which they propose to carry to the reserve fund, according to the provisions in that behalf hereinbefore contained."

Audit.

Art. 138: "Once at least in every year the accounts of the company shall be examined, and the correctness of the statement and balance-sheet ascertained by two auditors."

Art. 139: "The first auditors shall be appointed by the directors, and subsequent auditors shall be appointed by the company at each ordinary general meeting. The remuneration of the auditors shall be fixed by the company in general meeting."

Art. 142: "The auditors shall be supplied with copies of the statement of accounts and balance-sheet intended to be laid before the company in general meeting four days at least before the meeting to which the same are to be submitted, and it shall be their duty to examine the same, with the accounts and vouchers relating thereto, and to report to the company in general meeting thereon."

Trustees.

Art. 144: "The trustees of the company shall always be two of the members of the company, and shall be appointed and removed from office by the directors."

Two persons were named as the first trustees.

Art. 145: "All the property to which the company may be or become entitled shall be, and be deemed to be, the property at law of the trustees and be treated and considered as such in all legal proceedings whatever."

Art. 147: "The several shareholders shall, and they do, by these presents assign and set over in trust all right and title in and to their respective shares and interests in the capital, stock, property, estate, chattels, effects, actions, credits, and other things of the company unto the said trustees and to the trustees of the company for the time being, and the said trustees do hereby accept such trusts for the benefit of the shareholders for the time being of the company, and the said trustees, and all others who shall be appointed as such, are, and shall, at all times, upon being authorized and directed to that effect by the directors, be competent and also bound to make and conclude and to take and accept all purchases, sales, demises, leases, securities, and contracts relating to the concerns of the company, or to discontinue the same, also to compromise or submit to arbitration any matter or question in dispute, to sue and defend actions at law, or otherwise act as the directors shall deem most advisable for the interests of the company, and the receipt or receipts, or other acts and deeds of the trustees relative to all and every the matters aforesaid shall be good, sufficient, and absolute discharges, exonerations, and indemnities to and for any vendor, purchaser, or any other person whomsoever by, or to, or with whom any sale, purchase, contract, agreement, rent, moneys, or securities for money shall be made or given, provided, however, that the authority hereby given to and trust vested in the trustees shall not extend to interfere with the powers and privileges of the shareholders or the directors as provided by any clause or clauses of these presents relative to the management of the affairs of the said company."

Art. 148: "In case . . . . the directors by a resolution of the board . . . . or in case the shareholders at any extraordinary general meeting shall require all or any one or more of the said trustees to relinquish his or their said office, or in case all or any one or more of them shall be absent from South Africa for more than one month at a time (provided that leave of absence may be granted for a period exceeding one month by the directors) then and in such case the office of such trustee or trustees shall be deemed to have become vacant. . . . ."

Notices.

Art. 151: "A notice may be served by the company upon any member either personally or by sending it through the post in a letter addressed to such member at his registered address. Any member may name an address in South Africa to be registered as his address for service, and if he does not name such an address, he shall be deemed to have waived the service of the notice upon him."

E. L.

1905
May 26, 27.

GRUNNELL *v.* WELCH.

Landlord and Tenant—Distress—Trespass ab Initio—Second Distress for same Rent.

A bailiff, employed to levy a distress for rent in arrear, illegally broke in the front door; he then seized the furniture, but before selling it left the house, and being refused admittance on his return made no attempt to regain possession. Subsequently the landlord put in a fresh distress in respect of the same rent by a different bailiff acting under a fresh distress warrant, who seized the furniture, which was replevied before sale by the owner:—

Held, that the proceeding under the first distress warrant was a trespass ab initio and void as a distress, and that the landlord, having had no opportunity of satisfying his claim for rent by means of that proceeding, could lawfully distrain under the second warrant for the same rent.

Attack v. *Bramwell*, (1863) 3 B. & S. 520, and *Bagge* v. *Mawby*, (1853) 8 Ex. 641, considered.

APPEAL from a decision of the judge of the Waltham Abbey County Court in an action of replevin.

The plaintiff was the wife of the tenant of a house which had been let to her husband by the defendant, and in respect of which two quarters' rent were in arrear and owing at Midsummer, 1904. On July 19 a distress for the rent was put in by the defendant; the bailiff entered the house by forcibly breaking the chain of the front door and seized furniture which admittedly belonged to the plaintiff; except for the illegality of the original entry the whole of the bailiff's proceedings were in order. The bailiff remained in possession until July 30, on which day he left the house for two hours, and on his return was refused admission; he made no attempt to resume possession, but went away and did not return. On August 5 a fresh distress for the same rent was levied by a different bailiff under a fresh distress warrant; of the goods seized, some had, and some had not, been seized on the previous occasion. The furniture was removed and advertised for sale, whereupon the plaintiff took the necessary steps to replevy her goods, and in due course brought the present action of replevin in the county court. Before the replevin became effectual, the plaintiff and her

husband had brought an action in the High Court against the defendant in which they claimed damages in respect of the illegal entry on July 19, and the plaintiff had brought a further action in the High Court in which she claimed the restoration of the goods seized on August 5, together with an injunction against the defendant's selling or dealing with them; these actions, however, were abandoned after the present action of replevin had been brought. The county court judge held that the first proceeding was, upon the authority of *Attack* v. *Bramwell* (1), a trespass ab initio and void as a distress, and that the subsequent distress for the same rent was lawful. The plaintiff appealed.

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Foà, for the plaintiff. The second distress, being for the same rent as the first distress, was illegal. The first distress, although undoubtedly a trespass, and although in the event not fruitful to the landlord, was not void ab initio, and the learned county court judge in holding upon the authority of *Attack* v. *Bramwell* (1) that it was void ab initio has misapplied the principle of that decision. In that case there had been an illegal entry by a bailiff, for which it was not disputed that the landlord was responsible, and the important question in dispute was as to the measure of damages, it being held that the plaintiff was entitled to recover by way of damages the full value of the goods seized and sold, and not that value less the sum due for rent. There was no question as to a second distress, and under the circumstances any expressions in the judgment as to the distress being altogether void should be regarded merely as dicta and not as the statement of a legal principle. The proper remedy of the defendant in the present case was to sue for his rent; it is conceded that that course was open to him, but he could not distrain a second time for it.

[KENNEDY J. The rule that a landlord cannot distrain a second time for the same rent is based upon the possibility of the landlord having satisfied himself out of the first distress.]

The complete proposition is that a second distress for the

(1) 3 B. & S. 520.

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same rent is illegal where the first was capable of being productive of satisfaction of the landlord's claim, or would have been so but for a mistake on the part of the landlord. The first proceeding, notwithstanding its illegality by reason of the trespass in breaking open the door, was still a distress; it was not a void distress which could be treated as a nullity. The defendant is in the same position as the landlord in *Bagge* v. *Mawby* (1), where a second distress was held to be illegal because the landlord had abandoned the first distress without sufficient excuse; it is not, however, for the plaintiff to shew that the first distress could have been carried out.

[KENNEDY J. If a distress is bad ab initio, can the tenant retake the goods?]

No; they would be in the custody of the law. The distress is the taking into the custody of the law, and the time to be regarded is the impounding of the goods, after which the tenant cannot touch them; in the present case the impounding of the distress was complete. [He cited on this point Co. Litt. 47 b; Gilbert on Distress, p. 61; Blackstone, bk. 3, pt. 12.]

Whether the first distress was void or not, the defendant is estopped from setting up as a defence that it was void. In *In re Hallett's Estate* (2) Jessel M.R. said: "Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering." Applying the principle there laid down, the defendant cannot set up the illegality of the first distress in order to justify the second. [He also cited *Dawson* v. *Cropp* (3); Co. Litt. 48 b; Pollock on Torts, 6th ed. p. 379.]

Morton Smith, for the defendant. No question of estoppel arises in the present case; the defendant is not in any sense setting up his own wrongful act as an answer to the action. In an action of replevin, with an avowry of rent in arrear, it

(1) 8 Ex. 641. (2) (1880) 13 Ch. D. 696, at p. 727.
(3) (1845) 1 C. B. 961; 68 R. R. 868.

lies on the tenant to shew that the first distress could have been carried to a successful issue: *Dawson* v. *Cropp.* (1) The case is absolutely concluded by *Attack* v. *Bramwell* (2), which shews that the first proceeding was a mere trespass and void ab initio as a distress. *Bagge* v. *Mawby* (3) shews that the real question to consider is whether the landlord had an opportunity of working out the first distress and recovering the amount of rent due, and it is submitted that the illegal seizure and impounding (if there was an impounding) was not such an opportunity.

Foà, in reply. The period of time which must be looked at as the opportunity for the landlord to recover his rent is when the warrant of distress is handed to the bailiff.

KENNEDY J. I am of opinion that the decision of the learned county court judge was right and must be affirmed. It is contended by the plaintiff that there ought not to have been what is conveniently styled a second distress upon her goods, because there had already been one for the same rent. The question is one which is capable of being stated very shortly. Was the first proceeding a distress? In my opinion it was not. The county court judge relied upon *Attack* v. *Bramwell* (2) as shewing that the first distress was wholly void; the language of that decision is clear, and looking at the reason of the thing, apart altogether from authority, I can see no reason why there should not have been what for brevity I call a second distress in the present case. Distress is a special remedy for the protection of landlords, and clearly a landlord cannot levy twice for the same rent; if he levies for too small a sum it is his own fault, and he cannot repair it by a second levy. And if anything is done by the landlord after levying, by which, when he has the opportunity of rendering the distress fruitful, he surrenders or forbears to exercise his power of doing so, he cannot distrain a second time. What happened in the present case was that the first proceeding was simply a trespass, an illegality, and void ab initio; it was an

(1) 1 C. B. 961, at p. 972; 68 R. R. 868, at p. 875. (2) 3 B. & S. 520.
(3) 8 Ex. 641.

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actionable trespass, and an action of trespass has in fact been brought in respect of the act of the bailiff in wrongfully breaking into the house under colour of the distress warrant. The question really is, was the first proceeding a distress? That is, was it a proceeding in which the landlord could have got what he got by the second proceeding? That is exactly the way in which it was put by the pleader in *Dawson* v. *Cropp*. (1) In that case there had been a levy, which was not carried through, but was abandoned by the landlord for reasons which the Court held not to be good, and the Court had to consider whether the proceeding on the part of the landlord was one which amounted to a voluntary surrender of his rights under the levy. The pleadings are given in the judgment of Tindal C.J. (2), from which it appears that the replication of the plaintiff was (omitting immaterial portions) that "the defendant took and distrained divers goods and chattels of the plaintiff other than those in the last count mentioned as a distress for the said arrears of rent, the last-mentioned goods then being in and upon the said messuage with the appurtenances, and then being subject and liable to a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, &c., and the defendant then could and might and ought to have fully paid and satisfied the said arrears of rent, and the costs, &c., out of and with the said goods and chattels; yet the defendant wrongfully and vexatiously, and without any cause or excuse, refused and neglected so to do . . . ." Could such a plea have been truly pleaded on the facts in the present case? I am clearly of opinion that it could not. When the landlord became aware that the bailiff was a trespasser, it was clearly his duty to put an end to the situation, and it was also to his interest to do so, for by continuing the trespass he was rendering himself liable to further damages; but, as it turned out, the tenant prevented the landlord from acting by shutting out the bailiff and refusing to readmit him to the premises. It is quite clear that the landlord could not have satisfied the arrears of rent

(1) 1 C. B. 961; 68 R. R. 868.
(2) 1 C. B. 961, at p. 969; 68 R. R. at pp. 872, 873.

out of the property seized under the proceedings which have been called a distress. The whole foundation of a plea that there has been a prior distress lies in the fact that the landlord has already exercised his rights by taking proceedings which might and would have given him all that he was vexatiously seeking to get by the second proceedings. But there is nothing in the present case which could be successfully pleaded as a voluntary act on the part of the landlord amounting to a withdrawal from the completion of a distress which would, if persisted in, have given him all that he sought to obtain by means of the second proceeding.

Then it was contended for the plaintiff that, assuming that the first proceeding was a trespass and was void within the principle of the decision in *Attack* v. *Bramwell* (1), the defendant was estopped from setting up such a defence and thereby taking advantage of his own wrong, and a passage as to the doctrine of estoppel was cited from the judgment of Jessel M.R. in *In re Hallett's Estate.* (2) But in my opinion the defence of estoppel has no foundation in the facts of the present case upon which it can properly be based. Rent was admittedly due from the plaintiff, and the defendant levied a distress for that rent. It is contended that he had no right so to do, because he had previously distrained in respect of it. It is the tenant who is setting up the previous proceeding, and I do not see how any principle of estoppel can be invoked to prevent the landlord from saying that the illegal act of his bailiff cannot be set up as a prior distress, and that the plaintiff's right was to treat it, as in fact it was treated by the plaintiff, as a trespass. I think that the defendant is entitled to our judgment.

RIDLEY J. I am of the same opinion. The principles upon which a second distress is not allowed are fully discussed in *Bagge* v. *Mawby* (3) and *Dawson* v. *Cropp.* (4) In the former case Parke B. said (5): "There is nothing more clear than this, that a person cannot distrain twice for the same rent; for

(1) 3 B. & S. 520.
(2) 13 Ch. D. 696, at p. 727.
(3) 8 Ex. 641.
(4) 1 C. B. 961; 68 R. R. 868.
(5) 8 Ex. 641, at pp. 648-9.

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if he has had an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for his adopting such a course, as, for example, in the instance put by Lord Mansfield C.J. in the case referred to on the argument: *Hutchins* v. *Chambers*. (1) . . . But if there is a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first distress, and he cannot distrain again." How is the principle there enunciated to be applied to the facts of the present case? The first distress was illegal because it was a trespass, and it follows from the decision in *Attack* v. *Bramwell* (2) that, being a trespass, it was void ab initio. It is impossible to treat the language used in the judgment in that case as merely amounting to a dictum; there is the most definite statement in the judgment of Cockburn C.J. that the distress was altogether void and the entry on the plaintiff's premises and seizure of his goods a trespass ab initio. If that is the true doctrine, how does it apply to a case where the first distress (I use the expression for convenience) is altogether void, and the landlord seeks to enforce his rights by distraining again. I think it clear that in the present case the landlord had no opportunity of making the first distress effective; he had no means of doing that which it was said in *Bagge* v. *Mawby* (3) it was his duty to do—that is, to work out the payment of the rent by the first distress; he could not do so legally, for he was not in the position of a distrainor at all. It has been contended that he had that opportunity because he employed a bailiff; but that is not the sense in which the expression has been used. It may be true in a sense that an opportunity once presented itself to the landlord, by which one phrase used by Parke B. in his judgment might be satisfied; but if we take the concluding words of the same sentence, it is perfectly obvious that the defendant could not have worked out the payment of the rent by the original distress. When Parke B. used the expression, "if there is a fair opportunity,"

(1) (1758) 1 Burr. 579. (2) 3 B. & S. 520.

(3) 8 Ex. 641.

he obviously meant to refer to a state of circumstances in which during the distress the landlord has an opportunity of working out the amount of the rent by the machinery of the distress. Here the landlord had no such opportunity. For these reasons I think that the decision in *Attack* v. *Bramwell* (1) really governs the present case.

Then it is contended for the plaintiff that there was an impounding of the goods by the broker as the landlord's agent, and that during the continuance of that impounding the plaintiff could not take his goods out of the custody of the law. But the doctrine there invoked had its origin in the prevention of a breach of the peace, and it cannot compel us to hold that the first proceeding, which was a trespass ab initio, was equivalent to an actual distress. And it is further said that the defendant is estopped from taking advantage of his own wrong; but I agree with my brother Kennedy that that principle has no application to the case.

Appeal dismissed. Leave to appeal.

Solicitors for plaintiff: *Lumley & Lumley.*
Solicitors for defendant: *Avery & Sons.*

(1) 3 B. & S. 520.

W. J. B.

1905
June 27.

GEISSE *v.* TAYLOR AND HARTLAND. TAYLOR & HARTLAND, LIMITED, GARNISHEES. WESTON, CLAIMANT.

Attachment of Debts—Garnishee Order—Execution—Rights of Garnishor—Garnishee Company—Debenture-holder—Priorities—Rules of Supreme Court, Order XLV.

A judgment creditor obtained and served upon a limited company a garnishee order absolute attaching debts due from them to the judgment debtor. The garnishees subsequently borrowed, bonâ fide, a sum of money from W. and issued to him a debenture, covering all their assets and property, to secure the repayment of the loan. Execution against the garnishees was then put in by the garnishor; and, the sheriff having seized goods of the garnishees, W. appointed a receiver and claimed the goods under his debenture. On an interpleader issue to try the right to the goods seized as between the garnishor and the debenture-holder:—

Held, that the garnishee order did not give the garnishor any legal or equitable right to the goods in priority to the debenture-holder, who was therefore entitled to succeed in the issue.

APPEAL from a decision of the judge of the Bristol County Court on the trial of an interpleader issue remitted from the High Court.

The following facts appeared from the county court judge's notes and judgment:—

On July 13, 1904, the plaintiff C. Geisse recovered judgment in an action in the High Court against the defendants, Taylor and Hartland, for a sum of money and costs. In January, 1905, a limited company, Taylor & Hartland, Limited, were indebted to the defendants in a sum of money, and on January 16 the plaintiff obtained, under Order XLV., r. 1, of the Rules of the Supreme Court, a garnishee order nisi against the company attaching debts due from the company to the defendants' firm. This order followed Form No. 39 in App. K, Part I., of the appendices to the Rules of the Supreme Court, and ordered that all debts owing or accruing due from the garnishees to the judgment debtors be attached to answer the judgment recovered against the judgment debtors by the judgment

creditor in the High Court of Justice. The order nisi was duly served on the company, and on February 2 was made absolute and the order absolute sent to the company. On February 3 the company borrowed from the claimant Weston the sum of 250*l.*, and on the same day a debenture was issued by the company to Weston covering all the property and assets of the company. At the time when the debenture was given both Weston and the company knew that the garnishee order absolute had been obtained, and that an execution would at once be put in to enforce it. Execution against the company was issued on behalf of the judgment creditor under Order XLV., r. 3, and on February 7 the writ of fi. fa. was delivered to the London agents of the sheriff of Bristol. On February 8 execution was levied at the business premises of the company. On the same day Weston claimed the goods taken by the sheriff, and appointed a receiver under the powers conferred on him by the debenture. Subsequently Weston, under an order of the Court, paid to the sheriff the value of the goods seized, 38*l.* The sheriff thereupon withdrew, and paid the 38*l.* into court, and this issue was directed to try the right to the sum paid in as between the judgment creditor and the claimant.

The county court judge was of opinion (1.) that the debenture was not void as being a conveyance for the purpose of delaying, hindering, or defrauding the execution creditor within the meaning of 13 Eliz. c. 5, because the debenture was given for valuable consideration, and the proper inference to be drawn from the facts was that Weston took it simply to secure the amount of his loan, and there was no evidence that he had any intention to benefit the garnishees or to collude with them in any way; and (2.) that the effect of the garnishee order absolute was not to give something in the nature of a charge on the property of the garnishees which prevented them from disposing of their goods, and that the garnishees had power to mortgage their goods by means of the debenture notwithstanding that at the time when they gave it a garnishee order absolute had been made against them.

He therefore gave judgment for the claimant.

The judgment creditor appealed.

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R. V. Bankes, for the judgment creditor. First, on the facts, the debenture was a fraudulent conveyance within the statute of Elizabeth, being an arrangement between the company and the claimant to hinder, delay, and defraud the company's creditors.

Secondly, the garnishee order absolute, obtained under Order XLV., r. 1, of the Rules of the Supreme Court, effected a charge upon the company's property in priority to the debenture issued by the company to the claimant. In *Emanuel* v. *Bridger* (1) the Court held that a creditor who had obtained and made absolute under the Common Law Procedure Act, 1854, a garnishee order before the bankruptcy of the judgment debtor was a creditor holding a "charge" on the bankrupt's estate, as a security for a debt due to him, within the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 16, sub-s. 5. Quain J. in delivering the judgment of the Court said: "We think that the word 'charge' has a wider meaning than the words 'mortgage' or 'lien,' and we cannot doubt but that an execution creditor who has obtained, served, and made absolute his garnishee order before the bankruptcy, is a creditor holding a charge on a part of the bankrupt's estate as a security for a debt due to him within s. 16, sub-s. 5, and is therefore a creditor holding a security on the property of the bankrupt under s. 12." In *Ex parte Joselyne* (2) the Court of Appeal held that a judgment creditor who had obtained a garnishee order nisi attaching debts due to his debtor was a secured creditor in the subsequent bankruptcy of the debtor within the meaning of ss. 12 and 16 of the Bankruptcy Act, 1869. The learned county court judge, in the present case, thought that the above two decisions no longer applied, because s. 45 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), had put an end to the questions which arose under the Bankruptcy Act, 1869, as to the right of an execution creditor to be treated as a secured creditor in the bankruptcy of the judgment debtor; but Wright J.'s judgment in *In re National United Corporation* (3) shews that view to be wrong. In *In re Stanhope*

(1) (1874) L. R. 9 Q. B. 286. (2) (1878) 8 Ch. D. 327.
(3) [1901] 1 Ch. 950.

Silkstone Collieries Co. (1) a garnishee order nisi had been obtained against a company, but the order was not served on the garnishees before a petition to wind up the company was presented. The Court of Appeal held that the creditor was not a secured creditor at the commencement of the winding-up, but their judgments imply that he would have been a secured creditor if the garnishee order nisi had been served before the commencement of the winding-up. In view of the decisions a garnishee order must be a charge of some kind, legal or equitable, upon the garnishee. In interpleader proceedings all equitable rights are considered: see *Jennings* v. *Mather* (2); and the execution creditor here has, under the garnishee order, in equity a priority over the rights of the claimant under the debenture. [He also referred to *In re General Horticultural Co., Ex parte Whitehouse* (3); *Robson* v. *Smith* (4); *In re Roundwood Colliery Co., Lee* v. *Roundwood Colliery Co.* (5)]

Roskill, K.C. (*F. E. Weatherly* and *E. Layman* with him), for the claimant Weston. The county court judge's decision was right. As to the first point taken he has found, upon sufficient evidence, that there was no fraud or collusion to bring the case within the statute of Elizabeth, and his decision in that respect ought not to be reviewed. As to the second point, a garnishee order, whether nisi or absolute, creates no charge upon the goods or property of the garnishee; it does not place the garnishor in as high a position as that of a judgment creditor of the garnishee, and does not enable him to petition for the winding-up of a company who are garnishees: *In re Combined Weighing and Advertising Machine Co.* (6)

[KENNEDY J. In *Pritchett* v. *English and Colonial Syndicate* (7) Romer L.J. seems to have doubted the correctness of that decision.]

A garnishee order absolute is not a final judgment against the garnishee within s. 4 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the judgment creditor who has obtained

(1) (1879) 11 Ch. D. 160.
(2) [1901] 1 K. B. 108.
(3) (1886) 32 Ch. D. 512.
(4) [1895] 2 Ch. 118.
(5) [1897] 1 Ch. 373.
(6) (1889) 43 Ch. D. 99.
(7) [1899] 2 Q. B. 428.

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the order cannot issue a bankruptcy notice upon it against the garnishee: *Ex parte Chinery*. (1) *Emanuel* v. *Bridger* (2) and *Ex parte Joselyne* (3) do not apply here, the question in those cases being only whether the garnishee orders effected a "charge" upon the property of the bankrupt within the meaning of the Bankruptcy Acts, so as to make the garnishors secured creditors in the bankruptcy. There is nothing in any of the authorities cited for the judgment creditor to support the general proposition that a garnishee order charges the goods of the garnishee so that he is prevented from afterwards disposing of them.

R. V. Bankes replied.

LORD ALVERSTONE C.J. But for the doubt which I understand my brother Kennedy feels I should have thought this was a plain case. The question arises upon interpleader proceedings. [His Lordship stated the facts.] I accept Mr. Bankes' argument that upon the garnishee order being made absolute and served upon the company, the garnishees, they were bound to respect that order, and possibly might have been guilty of contempt of Court if they did not. That is the result of *Rogers* v. *Whiteley*. (4) The garnishee order is: [His Lordship read it.] The first point taken by Mr. Bankes was that the debenture was void under the statute of Elizabeth as being a fraudulent arrangement whereby the company were enabled to hinder, defeat, delay, or defraud their judgment creditor Geisse. The county court judge has found that in fact, and it is a question of fact, the transaction between the company and the debenture-holder was honest and not fraudulent. We must, therefore, take it that a sum of money was advanced to the company by the claimant by way of loan, the repayment of that sum being secured by the debenture issued by the company to the claimant, without any fraud or collusion on either side. Under those circumstances I am of opinion that the garnishees were entitled to issue the debenture without committing any breach of their duty under the garnishee order. They might have done many

(1) (1884) 12 Q. B. D. 342.
(2) L. R. 9 Q. B. 286.
(3) 8 Ch. D. 327.
(4) [1892] A. C. 118.

other things—such as making payments in the ordinary course of their business, paying wages, &c.—which would reduce the amount of money at their disposal for payment of the garnished debt, but which could not be alleged as breaches of their duty under the garnishee order; and, in my view, it cannot be asserted that they committed any breach of duty, either legal or equitable, under that order by entering into the transaction with the claimant, assuming it to be an honest transaction.

The second point taken for the garnishor was that the garnishee order absolute served upon the company gave him some kind of legal or equitable charge upon the property of the company which prevented the claimant from exercising his rights under the debenture. The garnishor issued execution under the power given by rule 3 of Order XLV., and claimed to get the goods under that process of the Court; but it cannot be reasonably contended that a person who issues execution under that rule can thereby place himself in any higher position than any other execution creditor of the garnishee who has issued execution either before or after the garnishor. What, on the authorities, is the position of a person who has obtained a garnishee order? In this Court it cannot be said that he resembles an ordinary creditor or a judgment creditor. The Court of Appeal, in *In re Combined Weighing and Advertising Machine Co.* (1), decided that a garnishee order cannot be made the ground for a petition to wind up a company; and, in *Ex parte Chinery* (2), that a bankruptcy notice cannot be founded upon it. Those decisions, therefore, seem to shew that the garnishor is not in the same position as an ordinary creditor to whom money is owed by his debtor, and indicate that in stating the duty of a garnishee it is not the true view that he cannot enter into and carry out subsequent transactions which are good as against the garnishor. It is true that in *Ex parte Joselyne* (3) James L.J. said: "The moment the order of attachment was served on the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor"; but that must be taken in conjunction with that which

(1) 43 Ch. D. 99. (2) 12 Q. B. D. 342. (3) 8 Ch. D. 327.

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Cotton L.J. said in the same case—that as against the judgment debtor the garnishee order nisi was a final and complete order transferring at once "the right to receive any money which might be due" from the garnishee to the judgment debtor. In *Rogers* v. *Whiteley* (1) Lord Halsbury L.C. said: "It is enough for me to say in reference to this case that the order as it is made, in the terms in which it is made, attaches all debts, that is to say all money which Mr. Whiteley could be called upon to pay away although more than the amount sufficient to satisfy the particular debt in question." The position of the garnishor in respect of the garnishee is different from that of an ordinary creditor or judgment creditor. The provisions of Order XLV., r. 3, enable him to obtain the issue of execution in aid of his rights under the garnishee order; execution is only a mode of enforcing the duty which the garnishee owes to the garnishor under the order. If I am right, the act of the garnishees here in obtaining, in their own interest and bonâ fide, an advance upon the debenture was valid and effectual, and the garnishor could not give himself priority by the issue of his writ of fi. fa. Unless the decisions establish that a garnishor is in a better position than an ordinary creditor, I cannot say that the garnishee's hands are so tied that he cannot deal with his assets, even though those assets might in certain events be made available for the payment of the garnished debt. Mr. Bankes' argument seems to concede that in order to succeed he must put the garnishor in a better position. I am of opinion that it is impossible to put the claim of the garnishor in a higher position than the debt of an ordinary judgment creditor, and that, I think, was the ground of the learned county court judge's judgment. I desire to add that, in my opinion, Mr. Bankes was right in his criticism of that part of the judgment which deals with the effect of the Bankruptcy Act, 1883.

I am of opinion that our judgment should be for the claimant.

KENNEDY J. I have nothing to add to what my Lord has said with respect to the point taken under the statute of

(1) [1892] A. C. 118.

Elizabeth. On the other point, I have felt during the argument a doubt which is not entirely dissipated. My doubt has been this: whatever may be the correct legal phrase to describe the position of a person who is a garnishor under the code relating to these proceedings, and accepting the decisions that he cannot properly found a bankruptcy notice upon the garnishee order or present a petition to wind up a garnishee company upon it, whether, having proceeded under the code, and got a garnishee order absolute, and served it upon the garnishee, he is after all in no better position, inasmuch as the garnishee may divest himself of the whole of the property which would enable him to obey the order of the Court, and so make that order wholly ineffective. I am not prepared to differ from the decision of the county court judge, because in the authorities cited before us it has been said that the only effect of a garnishee order is to attach the debt. But it is the fact in this case that a debenture was given to the claimant, having full notice of the garnishee order, and this debenture purported to be a charge upon all the property of the garnishees available for paying the debt due to the garnishor. When the execution was put in and the sheriff levied, the garnishor was met with this debenture for 250*l*. It is admitted that, if this debenture has priority, nothing would be left with which to pay the debt if the debenture were good as giving priority over the garnishee order. I have hesitated as to whether some equitable right at least had not been gained by the garnishor under the garnishee order entitling him to say that in determining priorities he ought to come in first. It is not disputed that equitable rights are to be recognised in interpleader proceedings. However, as I have indicated, I am not prepared to say that the judgment of the county court judge is wrong, having regard to the language of the House of Lords in *Rogers* v. *Whiteley* (1) and of the Court of Appeal in *In re Combined Weighing and Advertising Machine Co.* (2), citing *Chatterton* v. *Watney* (3), and to the strong opinion of my Lord upon the question before us.

(1) [1892] A. C. 118. (2) 43 Ch. D. 99.
(3) (1881) 17 Ch. D. 259.

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JELF J. I agree with the judgment of my Lord for the reasons which he has given.

Judgment for the claimant.

Solicitor for judgment creditor: *Henry Boustred.*

Solicitors for claimant: *Busk, Meller & Co., for H. A. Weston, Bristol.*

W. A.

C. A.

1905

May 19; *June* 9.

[IN THE COURT OF APPEAL.]

In re KEET.

Bankruptcy — Adjudication — Annulment — Debts — Release — "Payment in full" — Cash payment — Jurisdiction — Discretion — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 35.

Sect. 35 of the Bankruptcy Act, 1883, which requires, as a condition precedent to the exercise of the jurisdiction to annul an adjudication in bankruptcy, proof "that the debts of the bankrupt are paid in full," is not satisfied by an unconditional release given to the bankrupt by his creditors. To satisfy the section the "debts"—including at least all debts which have been actually and properly proved in the bankruptcy—must have been fully paid in cash.

The bulk of a bankrupt's creditors who had proved their debts in the bankruptcy executed a deed releasing him absolutely, without any consideration, from his debts owing to them, and agreed to withdraw their proofs: the few remaining creditors he paid in full in cash. He then applied, under s. 35 of the Bankruptcy Act, 1883, for the annulment of his adjudication on the ground that his debts had been "paid in full":—

Held (reversing the decision of the Divisional Court, Bigham and Darling JJ.), that there had been no "payment in full" within the meaning of the section.

Per Stirling L.J.: The jurisdiction conferred upon the Court by s. 35 to annul an adjudication is discretionary: and, in the absence of special circumstances, it would not be a good exercise of that discretion to make an order for annulment where, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted.

In re E. A. B., [1902] 1 K. B. 457, and *In re Pilling*, [1903] 2 K. B. 50, distinguished.

APPEAL by the official receiver against the decision of a Divisional Court (Bigham and Darling JJ.) sitting in Bankruptcy.

An order had been made by the registrar of the county court at Leeds annulling the bankruptcy of the above debtor, W. H.

Keet, in these circumstances. The debtor was an outside broker, and on September 24, 1903, a receiving order was made against him on a creditor's petition. On October 1, 1903, he was adjudicated a bankrupt. His liabilities were 9630*l.*, and, his assets being only 189*l.*, an order was made for the summary administration of his estate, and the official receiver became the trustee in the bankruptcy.

Only one dividend of 2*d.* in the pound had been declared, but, pending the decision of the present question, had not been actually paid.

On September 20, 1904, all the creditors, except a few whose debts amounted to 41*l.*, being desirous of helping the debtor to start again in business, executed a deed whereby, without any consideration, they absolutely released the bankrupt from their debts and agreed to withdraw their proofs. In a report made by the official receiver at the request of the Court of Appeal on the conclusion of the arguments on the present appeal, it was stated that the bankrupt personally obtained all the signatures to the release, and at the same time obtained the consents of the creditors to their proofs being expunged: that the release and the consents were taken to the registrar's office by the bankrupt personally or by his solicitors, along with the application to annul and his affidavit, the consents being exhibited as annexed thereto: that the object of filing the consents with the proceedings appeared to be to explain the fact that the dividend had not been paid, and under what circumstances the proofs of the debts remained on the Court file: and that no application to expunge the proofs to which the consents related had been made.

With regard to the remaining creditors whose debts amounted to 41*l.*, those were paid in full. Thereupon, on September 24, 1904, the bankrupt applied to the county court to annul his adjudication, putting in evidence the deed of release and proving by affidavit payment of the 41*l.* in full; and the registrar made the order.

The official receiver then appealed to the Divisional Court on the ground that the bankrupt had not complied with s. 35 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which provides,

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by sub-s. 1, that "Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication." The Divisional Court dismissed the appeal, holding that the requirements of the section had been complied with. In delivering judgment Bigham J. said that, in his opinion, "the debts of the bankrupt" had been "paid in full," or that which was equivalent to payment in full had happened. He did not agree that the payment must necessarily be in coin: he thought it might be in anything that the creditor chose honestly to take in satisfaction of his claim. In the present case there was no reason to suppose that what had been done had not been honestly done, nor did he see any reason to suppose that the bankrupt had misbehaved himself in such a way as to disentitle him to the exercise of the discretion of the Court in his favour.

Darling J. said the words of the statute were not very grammatical and not logical, but he thought that the section meant to apply to debts existing as debts until they were paid, and did not apply to those which were destroyed by another process.

The appeal was accordingly dismissed.

The official receiver appealed to the Court of Appeal.

The appeal was heard on May 19, 1905.

The Attorney-General (*Sir R. Finlay, K.C.*), and *S. G. Lushington*, for the Board of Trade. The question is whether there has been here such a "payment in full" of the debts of the bankrupt as entitles him to an annulment of his adjudication under s. 35, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). It is submitted that the present case is not covered by the sub-section; it deals with a bankrupt against whom no debts are any longer existing, and they can only cease to exist by their having been "paid in full." That distinguishes the present case from *In re E. A. B.* (1), which related

(1) [1902] 1 K. B. 457.

to a scheme of arrangement submitted under s. 3 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). That case was subsequently qualified by *In re Pilling* (1), which decided that if the debtor was himself a party to a scheme for getting rid of his debts by releases, that was a reason for disallowing the scheme under that section. If the debtor has got rid of his debts by a release instead of by payment, he has not satisfied s. 35 of the Act of 1883, for he cannot be said to have "paid" a debt which by a deed ceases to exist. If the debt is got rid of by a release there is no debt to "pay." The annulment can only be made upon a statutory ground, and the requirements of the statute must be strictly complied with.

[VAUGHAN WILLIAMS L.J. If there is an honest release, why should not the debts cease to exist for any purpose?]

That might open the door to arrangements which the Court could not look into.

[VAUGHAN WILLIAMS L.J. I understand your contention to be that the Court is not bound to accept an unconditional release as conclusive, and that it ought to ask for an explanation.]

That is so. If a debtor may go about obtaining releases from some of his creditors, and then come to the Court with a scheme of arrangement with the remainder, the result would be that the Court would be unable to have the whole scheme before it so as to arrive at a just exercise of its discretion under s. 3 of the Act of 1890.

The judge in bankruptcy has no power to annul the bankruptcy on any ground that may appear advisable at the time: he must find the necessary power in the Act itself: *In re Gyll.* (2) "Payment in full" must mean "payment in cash": *Spargo's Case* (3); *In re Burnett* (4); and clearly a release is not such payment. Here the bankrupt is seeking to resume his Stock Exchange transactions, and to enable him to do so he procures a release from his creditors for nothing. There has been no report of the official receiver, for he is required to report only where the application is for a discharge and not

(1) [1903] 2 K. B. 50, 59.
(2) (1888) 5 Morr. 272.
(3) (1873) L. R. 8 Ch. 407, 414.
(4) (1894) 1 Manson, 89.

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as a preliminary to an application for annulment; so that the Court has not before it, in order to guide its discretion, any official statement of the bankrupt's position or of the particulars of the scheme. An adjudicated bankrupt cannot obtain a discharge or annulment by an arrangement with his creditors which is not brought before the Court. The obtaining of his discharge or of an annulment of his adjudication is carefully guarded by Parts I. and II. of the Act of 1883. An order of adjudication effects a change of status; for under Part II. the debtor is disqualified for certain public offices, and he can only be restored to his rights as a citizen either by annulment of his adjudication or by a certificate of innocent misfortune: s. 32. Then s. 35 states the grounds for annulment, and for the consequent restoration of the bankrupt to his original status, by requiring either that the adjudication should be shewn to have been wrongly made or proof that the debts are "paid in full," that is, "the" debts, without exception. In the present case it is obvious that the bankrupt could not have succeeded on an application for his discharge, for his assets are not worth even 10*s.* in the pound. A release does not import accord and satisfaction under a plea of payment. The words of s. 35 are precise: the debts must not merely be "paid" but paid "in full," that is, penny by penny. For instance, under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), the disqualification of a town councillor by bankruptcy, under s. 52, could not be removed by composition, but only by "payment of his debts in full": *Hardwick* v. *Brown*. (1) That "payment in full" in s. 35 of the Bankruptcy Act, 1883, means what it says is strengthened by s. 36. The Act means a person who pays cash down.

In *In re Hester* (2) it was held that the consent of all the creditors to the rescission of a receiving order was not enough; that the Court would in such a case be guided by the provisions in s. 35 as to the annulment of an adjudication, and would only rescind the receiving order either when the debts were paid in full or if the order ought not to have been made. The cases as to schemes, though not strictly applicable to a case

(1) (1873) L. R. 8 C. P. 406. (2) (1889) 22 Q. B. D. 632.

such as the present, of the annulment of an adjudication, nevertheless illustrate the principle that the Court will, in considering whether a debtor shall be allowed any relief under the Bankruptcy Acts, take into consideration, not only the interests of the creditors, but also the interests of the public and of commercial morality: *In re Burr* (1); *Ex parte Painter* (2); *In re Beer.* (3)

It is said here that, if the 41*l.* is excepted from the debts released and that sum is paid in full, the terms of s. 35 are satisfied; but that will not do: the whole of the debts must be got rid of by payment "in full." It is submitted that the view taken by the Divisional Court of the meaning of the section is entirely erroneous.

Carrington, for the bankrupt. A release by creditors of their debts is within s. 35. If the persons with whom the debtor has been dealing choose to say they will release him, why should they not do so, assuming the transaction is an honest one? Here nothing is alleged against the debtor: he merely failed as any other stockbroker or business man might fail. The word "debts" in s. 35 does not necessarily mean debts existing at the date of the adjudication, just as it has been held that the words "debts provable" in s. 3, sub-s. 9, of the Bankruptcy Act, 1890, are not limited to debts provable at the moment of the receiving order: *In re E. A. B.* (4) Sect. 36 supports the view that debts released may be "considered as paid in full."

[ROMER L.J. What do you say that the word "debts" in s. 35 means?]

Debts actually existing as such and which, at the date of the application for annulment, have been paid.

[STIRLING L.J. Why should it not mean debts existing at the time the releases are obtained?]

The word "debts" is satisfied by the debts that are left after the releases—the debts other than those so discharged: thus the "debts" in the present case are those represented by the 41*l.*, and those must be paid "in full," as in fact they have

(1) [1892] 2 Q. B. 467.
(2) [1895] 1 Q. B. 85, 87.
(3) [1903] 1 K. B. 628.
(4) [1902] 1 K. B. 457.

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been. The reasonable construction of the section is to read "the debts of the bankrupt" as meaning "the then existing debts of the bankrupt," that is, the proved debts then existing: those are the debts that have to be paid in cash. The view of Darling J. is the correct one, namely, that the debts which are to be paid in full are those which have not been extinguished by release or otherwise.

[VAUGHAN WILLIAMS L.J. referred to *In re Rowe.* (1)

The Attorney-General. The payment there was not made on account of the debt.]

In s. 8, sub-s. 2, of the Act of 1890, the "balance of debts" for which a bankrupt is to consent to a judgment as a condition of his discharge means the "whole existing debts": it cannot mean debts that have been released.

[STIRLING L.J. I should think that, before the Court exercises what is admitted to be a discretionary jurisdiction under s. 35, it must inquire into all the circumstances of the case, just as upon an application for an order of discharge.]

The object of the release here was to save the bankrupt from the necessity of applying for a discharge, and from a probable order suspending his carrying on business for two years.

It is submitted that, whatever may be the meaning of the word "debts," it does not mean debts that have been expunged by release or otherwise.

The Attorney-General, in reply.

Cur. adv. vult.

June 9. VAUGHAN WILLIAMS L.J. In the present case the bankrupt applied in the county court for an annulment of his bankruptcy on the ground that all his debts which had not been released had been paid in full. The registrar made the order for annulment. There was an appeal to the Divisional Court consisting of Bigham J. and Darling J., who affirmed the order of the registrar. Not without some hesitation I have come to the conclusion that the present appeal must be allowed. I cannot agree with Bigham J. that the release of a debt is equivalent to or the same as "payment in full," which, by

(1) [1904] 2 K. B. 483.

s. 35 of the Bankruptcy Act, 1883, is the condition precedent to the exercise of the jurisdiction to annul, a condition which the bankrupt contends has happened in the present case. I have had more doubt as to whether Darling J. was not right when he treated s. 35 as dealing with debts which continued to be debts throughout the bankruptcy until they were paid, that is, extinguished by payment in full, and does not apply to those which have been put an end to by release. I agree with him that the language of the Act is inaccurate and does not strictly describe what Parliament meant to say. His view of the meaning of the section is rather supported by the language of s. 36, which runs thus: "For the purposes of this part of this Act, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court." Suppose the debtor alleges that he has paid all his debts and disputes the right of a creditor, who has executed an unconditional release, to be paid anything, and suppose thereupon the debtor enters into the necessary bond to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, it is not easy to see how the creditor suing could succeed, unless the issue raised was whether, at the commencement of the bankruptcy, the creditor had a provable debt. An issue as to whether the creditor, at the moment of the application to annul, had a provable debt would, so far as I can see, let in a replication by the debtor of a release. Moreover, it is not the debtor only who is affected by a released debt being regarded as continuing to be, for the purposes of s. 35, capable of payment. If a debt has been in truth and in fact unconditionally released, the proof ought to be expunged on the application of any creditor who, by reason of his proved debt, has a right to rank upon the debtor's estate.

With regard to s. 36, the only way out of the difficulty, in my opinion, would be to hold that, according to the true construction of that section, a bankrupt cannot dispute a proved

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debt, but is bound by the admission of the proof by the trustee administering his estate, and to read the words in s. 35 "that the debts of the bankrupt are paid in full" as meaning that the proved debts are paid in full—that is to say, not the debts only of those still entitled to share in the distribution of the bankrupt's estate, but also all debts which, having been proved, have not been discharged by payment in full; and on the whole I think this, and not the view of Darling J., is the right view. I believe, although I cannot find the case reported, I, when acting as judge in bankruptcy, expressed my approval of this construction. The section is not very clear, but I think that in practice it has always been construed as meaning that the condition of annulment is payment in full of all debts which have been admitted to proof, unless the proof has been expunged on the ground that it never ought to have been admitted.

In the present case it appears by the report of the official receiver that the bankrupt personally obtained all the signatures to the deed of release, and at the same time obtained the consents of the creditors to the proofs being expunged, which consents, together with the executed deeds of release, were exhibited to the bankrupt's affidavit, but no application to expunge the proofs, or any of them, has been made, and the proofs remain on the file. But, if the construction which I am putting on the section is right, the decision of the Court would have been the same, even if the proofs of the released debts had been expunged and removed from the file. No one can doubt that the words of the section will support this construction, although another construction may be possible; and to construe the section in the way contended for on behalf of the bankrupt would undoubtedly open the door to arrangements with creditors under which the Court, in ignorance of the true facts, might in the exercise of its discretion (for a bankrupt paying all his debts in full can only obtain an order for annulment if the Court thinks fit, and not ex debito justitiæ) order annulment of a bankruptcy which the Court, if it had known the circumstances under which the releases were obtained, would have refused to annul.

I have only to add that cases like *In re E. A. B.* (1) and *In re Pilling* (2)—which for the purposes of schemes of arrangement under s. 3 of the Bankruptcy Act, 1890, treat, for the purpose of the sanction of the Court to a scheme of arrangement, the "debts" as those debts of the debtor existing at the time of the application to the Court for its sanction to the scheme, to the exclusion of debts unconditionally released under circumstances which the Court considered did not preclude it from giving its sanction to the scheme—do not really affect the question of the construction of s. 35 at all. I think that the Court ought to read "debts" in s. 35 as meaning debts admitted to proof, because to hold "debts" to mean "provable debts" would make the payment in full by a bankrupt of debts for advances by relations and friends, who have not proved conditionally or otherwise, or in any way intervened in the bankruptcy, a condition precedent to the power of the Court to annul.

ROMER L.J. I have come to the same conclusion, and I can state my reasons very shortly.

In the first place, I cannot agree with Bigham J. that a debt which has been voluntarily released by the creditors can be said to have been paid in full. In the second place, it is clear from s. 35 itself that the word "debts" refers to debts which, at the date of the application for annulment, are no longer existing as such; and without considering to what debts previously owing the section is referring, I think that it must, at any rate, be meant to refer to and cover debts which have been proved, and rightly proved, in the bankruptcy.

STIRLING L.J. I am of the same opinion. I think that s. 35 of the Bankruptcy Act, 1883, must be read in connection with the other provisions of the Act. I refer particularly to those found in s. 28, which has, no doubt, been repealed but has been re-enacted in the subsequent Act of 1890, s. 8, with modifications and extensions. Sect. 28 provided that the Court should refuse discharge in all cases where the bankrupt

(1) [1902] 1 K. B. 457. (2) [1903] 2 K. B. 50.

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Stirling L.J.

had committed any misdemeanour under that Act, or Part II. of the Debtors Act, 1869, or any amendment thereof; and also should, on proof of any of the facts thereinafter mentioned, either refuse the order, or suspend its operation for a specified time, or grant the order of discharge subject to certain conditions. It follows, that in granting an order of discharge the Court exercises discretion. That clause has been repealed and re-enacted by s. 8 of the Act of 1890, and amongst the facts which the Court has to take into consideration under the present legislation are these—that the bankrupt's assets are not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities. Now, in the present case, the debts of the bankrupt amounted to nearly 10,000*l.*, and the assets have been sufficient to pay a dividend of 2*d.* in the pound only—a very serious fact, which would have to be taken into consideration if the bankrupt were applying for an order of discharge. He is not applying for an order of discharge, but he is applying for an order of annulment under s. 35, which provides that "where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication"—that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication.

Now, the question is whether such an order ought to be made in the present case, and the first point which has to be considered is whether the bankrupt has satisfied the condition prescribed by the Legislature—namely, is it "proved to the satisfaction of the Court that the debts of the bankrupt are paid in full"? First of all, What are the debts meant by this section? I agree with my brethren in thinking that the debts there referred to include, at least, all debts which have been actually and properly proved in the bankruptcy. How, then, have those debts been got rid of in the present case? The large mass of them have been got rid of by means of releases from the creditors—releases which have been given without any consideration. To test the case, let us suppose for a moment that it had been proved that those releases had been

given by the bulk of the creditors in consideration of a payment of 6*d.* in the pound: would that be a payment in full? I cannot think that is the meaning of the Act at all; and upon that point I respectfully differ from Bigham J.

The language of the Act, interpreted according to its natural meaning, appears to me to require a payment in full, a payment of money, something which in an action of law could, under the old practice, have been pleaded as a payment. If these releases had been given in consideration of a small payment, in my judgment they would not have satisfied the requirements of the Act; and still less can releases given without any consideration at all. I think, therefore, that the bankrupt has not satisfied the requirements of the Act so as to entitle him to an order for annulment. But I desire to add this, that the jurisdiction which is conferred by s. 35 is discretionary. The Act provides simply that the Court may, on the application of any person interested, by order annul the adjudication; and in my judgment, in the absence of special circumstances, it would not be a good exercise of discretion to make an order of annulment where, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted.

For these reasons I think that the order of the Divisional Court cannot be supported, and that this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Solicitor to the Board of Trade; Vincent & Vincent, for North & Sons, Leeds.*

G. I. F. C.

C. A.
1905
July 31.

[IN THE COURT OF APPEAL.]

In re G. J.
Ex parte G. J.

Bankruptcy — Bankruptcy Notice — Validity — "Final Judgment" — "In accordance with the Terms of the Judgment"—Judgment for Debt "and Costs to be taxed"—Bankruptcy Notice for Debt alone issued before Taxation of Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Rules of Supreme Court, Order* XLII., *r.* 18.

The plaintiff in an action in the King's Bench Division recovered judgment against the defendant for "1500*l.* and costs to be taxed." Before the costs had been taxed the creditor served on the debtor a bankruptcy notice claiming payment of the 1500*l.* alone:—

Held, that, having regard to rule 18 of Order XLII. of the Rules of the Supreme Court, which entitles a creditor who has recovered judgment for a sum of money and costs to issue separate writs of execution for the sum of money and the costs, the notice was a valid notice under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883.

In re H. B., [1904] 1 K. B. 94, distinguished.

APPEAL by the debtor from a receiving order made against him by one of the registrars.

On February 28, 1905, the petitioning creditor recovered judgment in an action against the debtor in the King's Bench Division for "1500*l.* and costs to be taxed."

On March 7, 1905, the creditor served the debtor with a bankruptcy notice requiring him to pay the 1500*l.*, the amount of the judgment debt.

The costs of the action had not then been taxed, but on March 15 they were taxed at 13*l.* 3*s.* 8*d.*

The debtor did not comply with the bankruptcy notice; and on April 6 the creditor presented the bankruptcy petition, in which he alleged that the debtor was indebted to him "in the sum of 1513*l.* 3*s.* 8*d.*, the amount due on a final judgment" dated February 28, 1905, "being as to 1500*l.* money lent by me to the said [debtor], and as to 13*l.* 3*s.* 8*d.* costs of the said judgment."

The act of bankruptcy alleged was the non-compliance with the bankruptcy notice.

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On the hearing of the petition it was objected on behalf of the debtor that the bankruptcy notice was bad because it did not require payment of the judgment debt "in accordance with the terms of the judgment," as provided by s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, inasmuch as it required payment of the 1500*l.* without mentioning the costs.

The registrar overruled the objection and made a receiving order.

The debtor appealed.

By consent of the parties the appeal was heard by two judges.

E. Clayton, and *W. H. Hunt*, for the debtor. It is submitted that the bankruptcy notice was a bad notice, because it did not, as provided by s. 4, sub-s. 1 (*g*) (1), of the Bankruptcy Act, 1883, require the debtor "to pay the judgment debt in accordance with the terms of the judgment." The notice required payment of the 1500*l.* alone, without mentioning the costs. It would, if this was a good notice, have been possible to issue a second bankruptcy notice for the costs when taxed. A creditor cannot split a judgment debt into two and serve a bankruptcy notice in respect of part of the debt, unless he abandons the other part. He must make it clear to the debtor that he abandons it.

(1) By s. 4, sub-s. 1, "A debtor commits an act of bankruptcy in each of the following cases" (inter alia):—

"(*g*) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

By the Rules of the Supreme Court, Order XLII., r. 18, "Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs and shall be issued not less than eight days after the first writ."

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[VAUGHAN WILLIAMS L.J. Under rule 18 of Order XLII. of the Rules of the Supreme Court a judgment creditor is entitled to issue separate executions for the debt and the costs.]

No doubt he can do that. But the procedure under sub-s. 1 (*g*) of s. 4 must be strictly followed, as strictly as if it were a criminal indictment. An adjudication of bankruptcy is of a quasi-penal nature. Under the Rules of the Supreme Court orders of the Court are enforceable as if they were judgments, and yet it has been held in many cases that such orders are not "final judgments" within sub-s. 1 (*g*) of s. 4: *In re H. B.* (1)

[VAUGHAN WILLIAMS L.J. In that case the bankruptcy notice required payment of the debt, not "in accordance with the terms of the judgment," but in accordance with the terms of an agreement between the parties. There is no agreement in the present case.]

It is submitted that there was not a final judgment in the present case until the costs had been taxed. There will be no hardship in so holding; the creditor would only have had to wait a few days till the costs had been taxed. The bankruptcy notice did not, as it should have done, make it clear to the debtor that he abandoned the costs, and indeed by his petition he claims the taxed costs as well as the debt. Though, under rule 18, the creditor is entitled to issue two executions, that rule does not apply to proceedings in bankruptcy, and it does not follow that the creditor can serve two bankruptcy notices.

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Chinery.* (2)]

In re Binstead (3) shews how strictly sub-s. 1 (*g*) ought to be construed.

H. C. Davenport, for the petitioning creditor, was not called upon.

VAUGHAN WILLIAMS L.J. I have no doubt that this bankruptcy notice was properly issued. There is a series of cases in which it has been held that in order to support a bankruptcy notice there must be what is properly called a "final judg-

(1) [1904] 1 K. B. 94. (2) (1884) 12 Q. B. D. 342.
(3) [1893] 1 Q. B. 199.

ment" against the debtor for a sum of money, and that the mere fact that the creditor is entitled to issue execution against the debtor for a sum of money is not conclusive that there has been a "final judgment" against him within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. If these cases are examined, it will be found that there is no decision that a bankruptcy notice cannot be issued for a judgment debt simply because the judgment includes also costs to be taxed, and the costs have not been taxed. What has been held essential to constitute a "final judgment" within sub-s. 1 (*g*) is that there must have been something amounting to a cause of action which has been dealt with on the basis of a cause of action, at any rate to this extent, that the debtor has had the opportunity of setting up a counter-claim, set-off, or cross-demand. And, if the debtor has not had the opportunity of doing that, the judgment or order does not come within the term "final judgment" as used in sub-s. 1 (*g*). This is what I understand was meant by Cotton L.J. in *Ex parte Moore* (1), when he said that a "final judgment" "is a judgment in an action between parties brought to establish some right of the plaintiff against the defendant. In giving judgment in that case"—*Ex parte Chinery* (2)—"I made use of these words: 'I think we ought to give to the words "final judgment" in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established, unless there is something to shew an intention to use the words in a more extended sense.' If a defendant has committed a tort, there is a previously existing liability on his part to the plaintiff. So here, there was a previously existing liability of the defendant arising out of his covenant contained in the partnership deed. He undertook not to carry on business as a solicitor within certain limits of space; he had broken that agreement, and his liability in respect of that breach was established by the judgment. Taking the very words of my judgment, they apply exactly to this case. Of course the order for the payment of costs did not enforce a pre-existing liability of the

(1) (1885) 14 Q. B. D. 627, at p. 635. (2) 12 Q. B. D. 342, at p. 345.

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defendant, but that order is part of a final judgment which did." And Lord Selborne L.C. said (1): "To constitute an order a 'final judgment' nothing more is necessary than that there should be a proper litis contestatio and a final adjudication between the parties to it on the merits." Under these circumstances, I have no doubt that in the present case there was a "final judgment" within sub-s. 1 (*g*), and, that being so, the only question is whether it is a final judgment in respect of which the creditor has a right to issue execution for the sum awarded independently of the costs. Having regard to the provisions of rule 18 of Order XLII., it is plain that the creditor is entitled, if he chooses to do so, to issue execution for the judgment debt and the costs separately. Having regard to the amount of the judgment debt as set forth in the judgment and to the form of the bankruptcy notice, it seems to me that it was made quite plain to the debtor that what the notice required him to pay was the amount of the judgment debt independently of the costs, and I think the creditor was under no obligation to abandon the right given to him by rule 18 to levy execution afterwards for the costs. In my opinion, the bankruptcy notice complied with all the requirements of sub-s. 1 (*g*) and was a valid notice. There was a final judgment for the 1500*l.*, and a notice requiring payment of that sum "in accordance with the terms of the judgment," because, having regard to rule 18 of Order XLII., the judgment creditor was entitled to issue execution for the 1500*l.* independently of the costs. The appeal must be dismissed.

STIRLING L.J. I am of the same opinion. I think the bankruptcy notice required the debtor to pay the judgment debt "in accordance with the terms of the judgment." At the time when the notice was served, the costs not having been then taxed, it was impossible to give any other notice than that which was given, i.e., a notice requiring payment of the 1500*l.* Rule 18 of Order XLII. entitled the creditor at his option to issue execution for the 1500*l.* separately. In my opinion, all

(1) 14 Q. B. D. at p. 632.

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the requirements of sub-s. 1 (*g*) have been complied with and the notice was a valid one.

In re H. B. (1) does not apply to the present case, for there the bankruptcy notice was not "in accordance with the terms of the judgment."

Appeal dismissed.

Solicitors: *Vanderpump; Norris, Allens & Chapman.*

W. L. C.

1905 *July* 17; *Aug.* 1.

In re DUNKLEY & SON. *Ex parte* WALLER.

Bankruptcy—Mortgage of Chose in Action after commencement of Bankruptcy—Bona fides—Protected Transaction—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 49.

After the presentation of a bankruptcy petition against debtors on which a receiving order was made, the debtors, before the date of the receiving order, assigned a sum of money payable to them to one of their creditors to secure a debt due by them to him, and he took the assignment in good faith and without notice of any act of bankruptcy committed by the debtors:—

Held, that the assignment was protected by s. 49 of the Bankruptcy Act, and was good as against the trustee in bankruptcy.

In re Badham, (1893) 10 Morr. 252, distinguished.

THIS was an application by the trustee in bankruptcy to set aside an assignment of a chose in action made by the debtors under these circumstances.

The debtors were traders, and on November 23, 1904, obtained from the Inland Revenue Commissioners an order for the repayment to them of 117*l.* 16*s.*, being the amount they had been over-assessed and had paid for income tax under Sched. D.

On November 28 they committed an act of bankruptcy. On December 1 a bankruptcy petition was presented against them, on which a receiving order was made on December 10, and on December 22 they were adjudicated bankrupts and a Mr. Waller became the trustee in bankruptcy.

(1) [1904] 1 K. B. 94.

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DUNKLEY & SON, *In re.* WALLER, *Ex parte.*

Meanwhile the debtors had on the previous December 5 assigned by deed the 117*l.* 16*s.* coming to them from the Inland Revenue to one Crane as security for a debt of 76*l.* due to him from them. This assignment was made in good faith, and Crane took it without notice of the act of bankruptcy of November 28 or of the bankruptcy petition, and on December 7 he gave notice of his charge to the Inland Revenue. The trustee in bankruptcy contended that, as his title related back to the act of bankruptcy committed on November 28, the assignment was void as against him.

Hansell, for the trustee. The assignment is not a protected transaction within s. 49. The money was in fact the property of the trustee. Under the doctrine of relation back it vested in him as from November 28. Further, the consideration for the assignment was a past debt. The valuable consideration intended by s. 49 means some fresh consideration passing at the time of the assignment, not a past debt. The case falls within the principle of *In re Badham*. (1) It is against the policy of the bankruptcy laws for a debtor during the period of relation back to turn an unsecured creditor into a secured creditor in consideration of a past debt.

Herbert Smith, for Crane. The assignment was taken in good faith. That distinguishes this case from *In re Badham* (1), which was a case of mala fides. *In re Seaman* (2) is in favour of the validity of the transaction.

Hansell, in reply. In *In re Seaman* (2) the creditor had a prior charge taken long before the commencement of the bankruptcy, and a further advance was made on the occasion of the second charge. Moreover, the arguments in the case turned mainly on order and disposition, and *In re Badham* (1) was not cited. The rights of unsecured creditors are crystallized at the date of the commencement of the bankruptcy, and within the period of relation back an unsecured creditor cannot obtain security for a past debt without proof of some further consideration.

Cur. adv. vult.

(1) 10 Morr. 252, 256. (2) [1896] 1 Q. B. 412.

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BIGHAM J. On November 28, 1904, the debtors committed an act of bankruptcy in respect of which a petition was presented against them on the following December 1. On December 5 they assigned to one of their creditors named Crane a debt to secure 76*l.* owing to Crane, and Crane at once gave notice of the assignment. On December 10 a receiving order was made against the debtors, and on December 22 they were adjudicated bankrupts. The question is whether the assignment to Crane is good as against the trustee. I think it is. The title of the trustee no doubt relates back to the date of the act of bankruptcy committed on November 28 (see s. 43), and thus primâ facie the assigned debt forms part of the estate which vests in the trustee. But the effect of s. 49 of the Act has to be taken into consideration. That section protects a transaction such as the one in question provided it takes place before the date of the receiving order, and that the person entering into it has not at the time notice of any available act of bankruptcy committed by the bankrupt. The assignment of the debt to Crane did take place before the date of the receiving order, and it is not suggested that Crane had notice of any act of bankruptcy. In these circumstances it appears to me that s. 49 applies, and that therefore Crane has a good title as against the trustee. It was argued on behalf of the trustee that the case was governed by the decision in *In re Badham.* (1) In that case the trustee sought to invalidate two payments made by the bankrupt on the ground that the bankrupt when making the payments intended to prefer the creditors to whom the payments were made. There was no doubt that the bankrupt had that intention, but inasmuch as the petition had been presented before—not after—the date of the payments the learned judge was constrained to find that the section dealing with fraudulent preferences (s. 48) did not apply. He then, however, allowed the notice of motion to be amended by striking out the claim to invalidate the payments on the ground of fraudulent preference and by substituting an allegation that they were made contrary to the policy of the bankruptcy laws. On this amended motion the question arose

(1) 10 Morr. 252, 256.

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Bigham J.

whether the payments were not protected by s. 49. They were certainly made before the date of the receiving order, and the payees equally certainly had no notice of any available act of bankruptcy; but the learned judge held that the payments were not made in good faith, that they were contrary to the policy of the bankruptcy laws, that they amounted in effect to a common law fraud, and that therefore s. 49 did not apply. I do not know on what grounds these conclusions were arrived at, but of course I am bound by the judgment and I am certainly anxious to give full effect to it. It is, however, distinguishable in its facts from the present case. Here the assignment of the debt to Crane was not, in my opinion, made in bad faith. It was no doubt made after petition, but it does not therefore follow that it was made in bad faith: if it did so follow, then no transaction entered into after petition and before receiving order would be within s. 49. The preference given by the bankrupts to Crane was perfectly good at common law, and it is not suggested that it was fraudulent under s. 48 of the Bankruptcy Act; and not being tainted with bad faith, as appears to have been the case in *In re Badham* (1), I see no reason why the creditor should not have the benefit of the protection afforded by s. 49. The application of the trustee must be refused with costs.

Solicitors: *Ward, Bowie & Co.; W. Hart.*

(1) 10 Morr. 252, 256.

H. L. F.

THE KING *v.* HANKEY.

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April 6.

Motor Car—Owner—Refusal to give Name and Address of Driver—Conviction, Form of—Motor Car Act, 1903 (3 *Edw.* 7, *c.* 36), *s.* 1, *sub-s.* 3.

A conviction of the owner of a motor car under s. 1, sub-s. 3, of the Motor Car Act, 1903, stated that the defendant did unlawfully refuse to give the name and address of the person who at a specified time and place was driving the defendant's motor car, such name and address being required in order that proceedings might be taken against him under s. 1 of the Motor Car Act, 1903, and rule 6, art. 4, of the Statutory Rules and Orders, 1904:—

Held, that the conviction was bad, in that it did not state what offence the driver of the motor car was alleged to have committed.

It is not a condition precedent to the obligation of the owner of a motor car to give the name and address of the driver of his car that the driver should previously have been asked for and should have refused to give his name and address.

RULE NISI for a certiorari to quash a conviction.

On the hearing of a summons against the Earl of Craven, before a Court of summary jurisdiction at Wokingham, under s. 1, sub-s. 3, of the Motor Car Act, 1903, for refusing to give the name and address of the driver of his motor car, evidence was given that on July 2, 1904, a motor car of which the defendant was the registered owner was being driven along the highway at Twyford, Berkshire, at a pace of from thirty to forty miles an hour; that a person on the highway in charge of a horse held up his hand as a signal to the driver to stop, but that the driver did not stop; that on August 4, 1904, a verbal application, after a previous written application, was made to the defendant by a police official for the name and address of the person who was driving his car on the occasion in question, and that the defendant refused to give the name and address. The justices convicted the defendant.

The conviction, omitting formal parts, was in the following terms: "The Earl of Craven is this day convicted before this Court for that he being on July 2, 1904, the owner of a certain motor car, No. A. C. 143, which was then being driven upon the highway in Twyford, Berkshire, did unlawfully on August 4,

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1904, after due notice had been given to him, refuse to give the name and address of the person who was then and there driving the same, such name and address being required in order that proceedings might be taken against him under s. 1 of the Motor Car Act, 1903, and rule 6, art. 4, of Statutory Rules and Orders, 1904."

The rule was granted on the grounds (1.) that the conviction was bad on the face of it, because it did not allege that the driver had committed an offence under s. 1 of the Motor Car Act, 1903, and did not allege that the driver had refused to give his name or address, or had given a false name or address; and (2.) that the justices had no jurisdiction to convict in the absence of evidence to the above effect. (1)

Cecil Walsh shewed cause against the rule. It is not necessary under s. 1, sub-s. 3, of the Motor Car Act, 1903, that the driver should have been asked for and should have refused to give his name or address before the owner can be convicted. That construction would defeat the whole object of the latter part of the section, which is intended to meet the case where a driver commits an offence and then drives on before his name and address can be taken. Secondly, the conviction is not bad in form. It states that the name and address of the driver were wanted in order that proceedings might be taken against him under the Act and Rules, which can only mean that it was alleged that the driver had committed an offence. In any event the granting of certiorari is discretionary, and, as there was a right of appeal in this case under s. 11, there is no ground for quashing the conviction.

Avory, K.C., and *A. M. White*, for the defendant, in support of the rule. The conviction is bad on its face, because the

(1) Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1, sub-s. 3: "If the driver of any car who commits an offence under this section refuses to give his name and address, or gives a false name and address, he shall be guilty of an offence under this Act, and it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he also shall be guilty of an offence under this Act."

offence alleged to have been committed by the defendant is insufficiently described. Under s. 1, sub-s. 3, the owner of a car can only be called upon to give the name and address of the driver when the latter has committed an offence under s. 1 of the Act. The conviction, therefore, ought to have stated that the driver had committed an offence under that section, or at least that he was alleged to have done so, and the particular offence should have been specified. The rule is that a conviction must be as precise as an indictment: *Smith* v. *Moody* (1), per Channell J. To say that proceedings are going to be taken against a man is not the same thing as saying that he has committed an offence. Moreover, even if the driver had committed an offence under rule 6 of art. 4 of the Statutory Rules (which deals with the failure of a driver to stop when requested by a police constable or a person in charge of a horse), that is not an offence under s. 1 of the Act; and therefore, if that were the offence which the driver was alleged to have committed, the owner was not bound to give the name and address. Secondly, on the true construction of s. 1, sub-s. 3, an owner is not bound to give the driver's name and address unless and until the driver has been asked for them and has refused to give them. It is true that that construction might lead to difficulty in applying the section to an owner; but the same difficulty would exist under s. 1, sub-s. 2, in the case of a driver.

LORD ALVERSTONE C.J. I have come to the conclusion that this conviction cannot be supported, but with great reluctance, because there are no merits in the points which have been raised on behalf of the defendant. The offence charged was that the defendant had failed to give the name and address of the driver of his motor car contrary to s. 1, sub-s. 3, of the Motor Car Act, 1903. It is contended on behalf of the defendant that there is no obligation on an owner to give this information unless the driver of the car has himself previously been asked for his name and address and has refused them. I do not construe the section in that way; the

(1) [1903] 1 K. B. 56, at p. 63.

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section deals with separate offences by different persons. By the earlier part it is enacted that if a driver who commits an offence under the section refuses to give his name and address, that refusal shall in itself constitute an offence under the Act. Then the latter part of the section provides that it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he also shall be guilty of an offence under this Act. That part of the section creates a distinct offence on the part of the owner, and to say that the owner is only bound to give the required information after a refusal by the driver would be to defeat the whole object of the latter part of the section, which is to meet the difficulty, and even impossibility, which frequently arises of getting the name and address from the driver himself. On this point, therefore, I should have decided against the defendant.

But a difficulty arises as to the form of the conviction, which, following the terms of the information, alleges that the name and address of the driver were required "in order that proceedings might be taken against him under s. 1 of the Motor Car Act, 1903, and rule 6, art. 4, of Statutory Rules and Orders, 1904." The objection may be taken to the form on the ground that it couples together s. 1 of the Act and art. 4 of the Rules, for it is not clear that the owner can be compelled to give the name and address of the driver where the offence committed by the driver is an offence under the Rules and not under the Act. But the main objection to the form of the conviction is that it nowhere states in terms that the driver has committed any offence at all. What it does say is that the name and address were required "in order that proceedings might be taken." Looking at the earlier part of the section, that is almost sufficient; but, bearing in mind the important and salutary rule that a conviction must be as certain in its allegations as an indictment, I think that it is safer to hold that this conviction does not allege in sufficiently clear terms what offence had been committed by the driver.

The rule must, therefore, be made absolute to quash the conviction. 1905

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KENNEDY J. I agree.

RIDLEY J. I agree.

Rule absolute.

Solicitors in support of the rule: *Firth & Co.*

Solicitors against the rule: *Fox & Higginson, for Cave & Wilson, Bracknell.*

F. O. R.

GILBERT, APPELLANT *v.* JONES, RESPONDENT. 1905 *Aug.* 2.

Common Lodging-house—Charitable Institution—No Payment by Inmates—Common Lodging Houses Act, 1851 (14 & 15 *Vict.* c. 28)—*London County Council (General Powers) Act*, 1902 (2 *Edw.* 7, *c. clxxiii.*), *Part IX.*

A house carried on as a charitable institution for the reception of destitute persons of the poorest class who are treated in a manner similar to that in which the frequenters of common lodging-houses are treated, with the exception that no payment of any kind is made by or on behalf of the persons admitted, is a common lodging-house within the Common Lodging Houses Act, 1851, and Part IX. of the London County Council (General Powers) Act, 1902.

Logsdon v. *Booth*, [1900] 1 Q. B. 401, and *Logsdon* v. *Trotter*, [1900] 1 Q. B. 617, followed.

CASE stated by a metropolitan magistrate.

Two informations had been preferred by the respondent against the appellant, (*a*) for that the appellant at a house known as the Providence Row Night Refuge, Crispin Street, Stepney, the appellant being a person having or acting in the care or management of the house as a common lodging-house, refused to give an officer of the local authority free access to the house when required, contrary to the provisions of the Common Lodging Houses Act, 1851; and (*b*) for that the appellant did keep the same house as a common lodging-house and receive lodgers therein without having applied for and obtained a licence under Part IX. of the London County Council (General Powers) Act, 1902.

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The two informations were heard together, and the following facts were proved or admitted. The house in question was kept by the appellant. On November 1, 1904, an officer of the London County Council under the Common Lodging Houses Act, 1851, was refused access to the house by the appellant. The appellant had not applied for or obtained a licence in respect of the house under Part IX. of the London County Council (General Powers) Act, 1902. The persons admitted to the house were destitute and of the very poorest class, but in other respects did not differ from the class who habitually frequent the cheapest common lodging-houses; and while they were in the house they were treated and dealt with in a manner similar to that in which the habitual frequenters of common lodging-houses are dealt with and treated. On the night of November 1, 1904, about 150 men and about 70 women slept in the house. Persons admitted slept in bunks placed in open dormitories, each dormitory containing about seventy persons, separate dormitories being provided for men and women. Each person admitted to the house was provided with supper and breakfast, and these meals were taken by such persons together in common rooms. The house was clean, and well kept and conducted. The house was known as "The Dormitory" among those admitted to it and others of the same class to distinguish it from the ordinary houses used by frequenters of common lodging-houses. No payment of any kind, direct or indirect, was made by or on behalf of any of the persons admitted.

It was contended on behalf of the appellant that the case was distinguishable from the cases of *Logsdon* v. *Booth* (1) and *Logsdon* v. *Trotter* (2) upon the ground that those cases did not decide that a house where no payment was made was a lodging-house, but only that the particular lodging-houses in question in those cases were common lodging-houses; that the expression "common lodging-house" meant no more than a lodging-house with an adjective attached expressive of the kind of person admitted and the kind of business done therein; and that the meaning of the word "lodging-house" in plain English

(1) [1900] 1 Q. B. 401. (2) [1900] 1 Q. B. 617.

(as is shewn by the words "public lodging-house," which are defined in the Towns Improvement Clauses Act, 1847, s. 116, and the City of London Sewers Act, 1848, s. 91, and 1851, s. 10) necessarily implied the letting and hiring of lodgings for payment, and necessarily excluded the present case, where there was no payment.

It was contended on behalf of the respondent that the cases of *Logsdon* v. *Booth* (1) and *Logsdon* v. *Trotter* (2) governed the present case; and that, the Acts being sanitary Acts, the words "common lodging-house" must in the public interest include the present case, which was within the meaning of these Acts.

The magistrate decided that the case was within the cases of *Logsdon* v. *Booth* (1) and *Logsdon* v. *Trotter* (2); and he, therefore, held that the house in question was a common lodging-house within the meaning of the London County Council (General Powers) Act, 1902, and the Common Lodging Houses Act, 1851; and he accordingly convicted the appellant.

The question for the consideration of the Court was whether the magistrate was right in so deciding.

G. W. Ricketts, for the appellant. The fact that no payment was made by the persons admitted to this house distinguishes the present case from *Logsdon* v. *Booth* (1) and *Logsdon* v. *Trotter*. (2) In those cases there was a payment, though no profit was made, and it was assumed that the premises were lodging-houses, the question being whether they were common lodging-houses. In the present case the absence of payment by the inmates prevents the house from being a lodging-house, common or otherwise, a payment of some kind being an essential part of the definition of a common lodging-house as given in the standard dictionaries and in the Towns Improvement Clauses Act, 1847, s. 116, and the City of London Sewers Act, 1848.

Avory, K.C., and *Ryde*, for the respondent, were not called upon.

LORD ALVERSTONE C.J. In this case it is contended on behalf of the appellant that the fact that no payment was made

(1) [1900] 1 Q. B. 401. (2) [1900] 1 Q. B. 617.

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by the inmates of this house prevents it from being a common lodging-house within the meaning of the Common Lodging Houses Act, 1851, and Part IX. of the London County Council (General Powers) Act, 1902, and that on that ground the case is distinguishable from the cases of *Logsdon* v. *Booth* (1) and *Logsdon* v. *Trotter*. (2) It is, therefore, important to examine those cases and to see what really was decided by them. It had been held in the earlier case of *Booth* v. *Ferrett* (3) that, if a house was maintained as a charitable institution and not for the purposes of gain, it was not a common lodging-house; but that decision, which would have materially assisted the appellant's contention in this case, was considered by the Court in *Logsdon* v. *Booth* (1), and the Court came to the conclusion that *Booth* v. *Ferrett* (3) was wrongly decided, and that the mere fact that an institution is a charitable one carried on without any object of making a profit was not sufficient to differentiate it from a common lodging-house. *Logsdon* v. *Booth* (1) is a strong authority, because the judges who decided it felt that they were justified in overruling *Booth* v. *Ferrett*. (3) The question was further considered in the case of *Logsdon* v. *Trotter* (2), in which the principles laid down in *Logsdon* v. *Booth* (1) were applied to slightly different facts. The result of the authorities is therefore that, in determining whether any particular house or institution is a common lodging-house, the question whether the house or institution is carried on for profit is not to be taken into consideration; and, that being so, I cannot see any distinction in principle between a charitable institution where a small payment is required from the inmates, possibly for the purpose of keeping a sort of check on the class of people using the place, but at any rate not as a source of gain to the institution, and one where no payment at all is made.

I am quite sure that there will not be the slightest attempt to interfere with the excellent work which is being carried on at this institution, but from the point of view of the Acts in question, which are sanitary Acts, I can see no reason for

(1) [1900] 1 Q. B. 401. (2) [1900] 1 Q. B. 617.
(3) (1890) 25 Q. B. D. 87.

distinguishing this case from the two previous decisions; and in my opinion the decision of the learned magistrate was right, and the appeal must be dismissed. 1905 GILBERT v. JONES.

LAWRANCE and RIDLEY JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Bellord & Coveney.*
Solicitor for respondent: *W. A. Blaxland.*

F. O. R.

LONDON COUNTY COUNCIL, APPELLANTS *v.* SCHEWZIK, RESPONDENT. 1905 *Aug.* 4.

London — Buildings — "Structure" — Projection beyond General Line of Buildings—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), s. 22, *sub-s.* 1; *s.* 73, *sub-s.* 8; *s.* 164.

An iron framework, filled in on the front and sides with leaded glass and covered on the top with zinc, about 10 feet 6 inches long, and about 5 feet 6 inches high from the bottom to the top of the gable, was fixed to the front wall of a building by means of bolts at the bottom and stay-rods at the top. It came forward about 4 feet 6 inches from the front wall of the building, and at its lowest point was 11 feet above the pavement:—

Held, that the framework was not "a structure erected beyond the general line of buildings" within s. 22, sub-s. 1, of the London Building Act, 1894, and was not a "projection" within s. 73, sub-s. 8.

Hull v. *London County Council*, [1901] 1 K. B. 580, followed.

CASE stated by a metropolitan magistrate.

The respondent had appeared to answer two informations which had been laid against him by Thomas Chilvers on behalf of the London County Council. The first of the informations charged that the respondent on or about December 21, 1903, at No. 86A, Brick Lane, in the metropolitan borough of Stepney, and within the borough of Stepney and within the metropolitan police district, did unlawfully erect a structure in contravention of Part III. of the London Building Act, 1894, to wit, erect a structure beyond the general line of buildings of the street, Brick Lane, without the consent in

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writing of the appellants, whereby the respondent became liable to the penalty prescribed by s. 200, sub-s. 3, of the said Act as amended by the London Building Act, 1894 (Amendment) Act, 1898, and to have an order made against him to demolish the said structure. The second information charged that the respondent at the time and place above mentioned did unlawfully extend from a building a projection beyond the general line of buildings in the street aforesaid without the permission of the appellants, contrary to s. 73, sub-s. 8, of the London Building Act, 1894. (1)

The two informations were heard together, and the following facts were proved or admitted.

The respondent was the proprietor of the premises situate at 86A, Brick Lane, and known as the Russian Vapour Baths, and he had caused to be placed over the doorway leading to the said baths the thing complained of, which is hereinafter referred to as the alleged structure or projection.

The alleged structure or projection consisted of an iron framework filled in on the front and sides with leaded glass and covered on the top with zinc, and was about 10 feet 6 inches long, about 5 feet 6 inches high from the bottom to the top of the gable, and came forward about 4 feet 6 inches from the front wall of the building, the bottom being about 11 feet above the pavement. There were letters on the glass of the alleged structure or projection forming on the front the words, "The Russian Vapour Baths," and on the side "Vapour Baths," indicating the position of the baths, and these were made visible at night by means of twenty electric lights arranged inside.

The alleged structure or projection was beyond the general

(1) By the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22, sub-s. 1, "No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street."

Sect. 73, sub-s. 8: "Except in so far as is permitted by this section in the case of shop fronts and projecting windows, and with the exception of water-pipes and their appurtenances, copings, string-courses, cornices, facias, window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of buildings in any street except with the permission of the council after consulting the local authority."

line of buildings as defined by the superintending architect, and was erected without the consent in writing of the appellants.

The alleged structure or projection was fixed to the front wall of the building by means of six bolts at the bottom and two stay-rods at the top, which latter went right through the wall.

The appellants contended that the respondent had erected and brought forward a structure in contravention of the provisions of s. 22, sub-s. 1, of the London Building Act, 1894, and that he had also extended a projection from the said building in contravention of s. 73, sub-s. 8, of the Act.

The respondent contended that the alleged structure or projection was neither a structure nor a projection within the meaning of the sections above referred to.

Upon the above facts the magistrate came to the conclusion that the alleged structure or projection was not a structure within the meaning of Part III. of the London Building Act, 1894, nor was it ejusdem generis with any of the matters or things described or referred to in Part III., nor was it a projection within the meaning of s. 73, sub-s. 8, of the Act, nor ejusdem generis with any of the matters or things described or referred to in any part of the section.

The magistrate dismissed both the informations.

The question for the opinion of the Court was whether upon the above facts the magistrate was right in law in dismissing the information or either of them.

Avory, K.C., and *Daldy*, for the appellants. The magistrate's decision was wrong on both points. This iron framework is a structure which has been erected beyond the general line of building within s. 22, sub-s. 1, of the London Building Act, 1894: *Coburg Hotel* v. *London County Council*. (1) Secondly, it is a "projection" within s. 73, sub-s. 8. On this point the magistrate held that the case was covered by *Hull* v. *London County Council* (2); but the facts of that case were not at all the same as those of the present case; and it is submitted

(1) (1899) 81 L. T. 450. (2) [1901] 1 K. B. 580.

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that in any event that case was wrongly decided and ought not to be followed. The ratio decidendi there was that a projection to be within s. 73, sub-s. 8, must be part of a building; but if that be so, s. 22 would cover every case, and s. 73, sub-s. 8, would not be necessary. *Hull* v. *London County Council* (1) was adversely criticized in *London County Council* v. *Illuminated Advertisements Co.* (2)

Danckwerts, K.C., and *Randolph*, for the respondent. This case is not within either s. 22 or s. 73, both of which are building sections. The section which does deal with things of this sort is s. 164, under which the council have power to make by-laws with regard to "the regulation of lamps, signs, or other structures overhanging the public way." It would be absurd to have by-laws under that section for the regulation of a thing if it could be prohibited altogether under s. 22 or s. 73. The reasoning of *Hull* v. *London County Council* (1) is sound, and applies to the facts of this case.

Avory, K.C., in reply. Sect. 164 and s. 73 are not exclusive of each other. A power to prohibit is required as well as a power to regulate.

LORD ALVERSTONE C.J. We are all of opinion that this structure does not come within s. 22 of the Act, and I only refer to my observations in *London County Council* v. *Illuminated Advertisements Co.* (2) with regard to the sections following s. 22 to indicate that in my opinion s. 22 is a building section, and that it does not extend to or include things which are added on to buildings. It is not necessary to say more on this part of the case, except that there is no finding of fact in the case which would bring this structure within the decision in *Coburg Hotel* v. *London County Council.* (3) With regard to the second question in the case, which turns on s. 73, sub-s. 8, speaking for myself only, I do not withdraw anything which I have said as to not being satisfied with the decision in *Hull* v. *London County Council* (1); but the reasoning of that case (and the judgment was delivered after consideration) undoubtedly

(1) [1901] 1 K. B. 580. (2) [1904] 2 K. B. 886.
(3) 81 L. T. 450.

applies to this case. I think the principle of *Hull* v. *London County Council* (1) is that s. 73 forms part of a group of sections which deal with the question of the construction of buildings. I do not refer again to all the sub-sections of s. 73; I will only point out that the section deals with such things as balconies, verandahs, outside steps, barge-boards, cornices, pipes, shop fronts, copings. Therefore I think, looking at the section, it is easy to see that at any rate there is a ground for contending that the view which was taken by Bruce and Phillimore JJ. in that case was the right one, although I should have been better pleased had the matter been looked at from rather a broader standpoint. I come clearly to the opinion that this is a projection from the building, and I think that ought to be distinctly stated; I think no one can look at this thing without seeing that it is a projection from the building; but if my brother Bruce is right, a mere projection from a building is not of itself sufficient, and this argument is strengthened by the fact that there is a considerable number of undoubted projections from buildings which, either adopting the reasoning of my brother Bruce or accepting the views suggested in argument by counsel, do not fall within the section. I particularly call attention to those very heavy lamps which are hung on big brackets and are as rigidly fixed to the wall as this is, and which, on the reasoning of my brother Bruce, and possibly on the view taken or presented in argument, do not come within this section. Speaking for myself, I do not accept the argument that the London County Council could not deal with such things under s. 164. I quite understand Mr. Avory's point that under s. 164 there is only power to make by-laws to regulate them; but it seems to me by no means to follow that under that power there may not be by-laws providing that their structure and method of erection, and fastening and matters of that sort, shall be subject to the approval of the London County Council. Be that as it may, I do not think the matter has been left absolutely at large by the Legislature. I think there are other sections in the Act which apply to it. It is important also to remember that this is primâ facie a Building Act, and, therefore, we

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should expect to find in such sections as ss. 22 and 73 provisions with regard to buildings.

It seems to me that, looked at fairly, this obstruction is in the nature of a hanging porch fastened to the wall of the building, and I am of opinion that it undoubtedly projects from the building, but that it does not project from the building in the sense of s. 73, as construed by the Court in the case of *Hull* v. *London County Council* (1), although I should have been more satisfied if the decision in that case had dealt with the question on broader lines, as I indicated in *London County Council* v. *Illuminated Advertisements Co.* (2) I cannot see any distinction or ground upon which I ought to distinguish this case from *Hull* v. *London County Council.* (1) I only desire to say, coming to that conclusion, that there is an important matter which I have mentioned more than once since I have been sitting in this Court, and I refer to it again because of its extreme importance, and that is the importance of uniformity in the decisions of this Court. The Court of Appeal have recently recognised that it is desirable in the public interest, and in order that people may know with certainty what their position is, that Courts of co-ordinate jurisdiction should follow their decisions unless there are strong grounds which enable the Court to say that the previous decisions ought not to be followed. I have no doubt that the matter can be so arranged that these cases can be reviewed by the Court of Appeal. There is no difficulty about that being done if it is really desired to take the matter further. But failing that, as I cannot on any ground satisfactory to my own mind distinguish the principle of this case from the principle of *Hull* v. *London County Council* (1), I come to the conclusion that this appeal should be dismissed.

LAWRANCE J. I have come to the conclusion that *Hull* v. *London County Council* (1) was rightly decided. It seems to me, looking carefully at the Act, that the language of s. 73 does not cover the structure, if I may call it so, which we are considering in this case. I think that s. 102 in Part IX.

(1) [1901] 1 K. B. 580. (2) [1904] 2 K. B. 886.

contains the true definition of this particular sort of thing affixed to a building. That section says "the expression 'structure' includes any building, wall, or other structure, or anything affixed to or projecting from any wall or other structure." That is exactly what this is—not a part of the building, but something affixed to and projecting from a building, wall, or other structure. If that language had been used in s. 73, I should have come to the conclusion that *Hull* v. *London County Council* (1) had been wrongly decided. The matter may also be dealt with, I think, under s. 164. How far it may be dealt with by that section it is not necessary to decide at the present moment; but power is given to make by-laws for the regulation of lamps, signs, and other structures overhanging the public highway. So that in two parts of the statute you have this very structure itself, this projection, dealt with; but in s. 73 it is not, in my opinion, dealt with. That leads me to the conclusion that *Hull* v. *London County Council* (1) was rightly decided, and I am willing to follow it in this decision. I am therefore of opinion that this appeal must be dismissed.

RIDLEY J. In this case I agree with the Court; but I must say that, speaking personally, I should have come to the conclusion that this structure is a projection extending from the building within the meaning of s. 73. I do not think it is a building connected with part of the building itself, and therefore it is not within that part of the judgment which I gave in *Coburg Hotel* v. *London County Council* (2); but I should have thought it was a projection. I agree that, according to s. 73, there has to be something of a permanent character—something permanently attached to the building—something which is not merely to be regarded as temporarily put there, nor of a light character, which, to use the words of *Hull* v. *London County Council* (1), does not extend over the roadway. But when a permanently constructed framework like the present one is attached to a building in the way this one is attached, I should have thought that it was a projection within the meaning of s. 73, and that we ought so to regard it. I am, therefore, hampered in the

(1) [1901] 1 K. B. 580. (2) 81 L. T. 450.

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present instance by the previous decision of *Hull* v. *London County Council*. (1) If that case is to be taken to apply to a projection like the present, I think it is wrong. I should certainly have come to the contrary conclusion myself, but I follow what the Lord Chief Justice says, and I consider myself bound by that case. Before, however, I conclude what I have to say, I wish to point out that in that case I cannot help thinking the Court was more or less influenced, in coming to the conclusion at which they arrived, by considering the way in which that sign or wooden box was attached to the wall, and by the fact that there was a space between it and the wall, and that it did not extend at all over the highway, and generally the small and insignificant character of that which was the subject of the case. If the reasoning of Bruce J. is considered, it will be seen that he said: "A projection from a building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building." Now I think that in the general sense of those words this framework does so. "If the words are taken in this sense they fall in with the scope of the section. It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage in order to maintain architectural uniformity." In the case with which Bruce J. was dealing, I do not think that any one could have said that the wooden box did interfere with the width of the street or the general line of building frontage, nor had it anything to do with the maintenance of architectural uniformity; but when one finds a framework of this kind, which projects solidly and for a considerable distance over the highway, on which the public are accustomed to walk, it seems to me that, if one is to judge of the proper meaning of this section by considering what the object of it was, this was within the object of the section, while the other was not. It is easy enough, when dealing with a small matter such as a lamp might be, or as the box was in *Hull* v. *London County Council* (1), to deal with that under s. 164. The power to regulate it is sufficient. But

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when you have a structure like this, and I do not use the word structure advisedly—I mean a framework of a heavy kind like this projecting from a building as this was—then it appears to me that a different series of considerations arise. More than a regulation is required: a power is wanted which will enable one to do that which s. 73 does enable the London County Council to do with regard to architectural projections. However, although that is my view, I am unable to say that what I have been pointing out as possibly the reason which actuated the Court in the case of *Hull* v. *London County Council* (1) is really the distinction between the two cases. I do not pretend to say that it is. I think I must adopt the reasoning in *Hull* v. *London County Council* (1), and agree with the rest of the Court; but I should, if I had been left to myself and without that decision, have come to the conclusion that this structure could have been dealt with as a projection under s. 73.

Appeal dismissed.

Solicitor for appellants: *W. A. Blaxland.*
Solicitors for respondent: *Pritchard, Engleficld & Co.*

(1) [1901] 1 K. B. 580.

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[IN THE COURT OF APPEAL.]

In re COHEN.

Bankruptcy—"Trustee"—Onerous Property—Leaseholds—Disclaimer, Time for—"First Appointment of Trustee"—Creditors' Trustee—Official Receiver as Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 21, *sub-ss.* 1, 4, 6; *s.* 54, *sub-s.* 1; *s.* 55, *sub-s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.

The words "after the first appointment of a trustee" in s. 55, sub-s. 1, of the Bankruptcy Act, 1883—which, as amended by s. 13 of the Bankruptcy Act, 1890, empowers "the trustee . . . . at any time within twelve months after the first appointment of a trustee" to disclaim any onerous property of the bankrupt—refer to an appointment of a trustee under s. 21, either by the creditors (sub-s. 1) or by the Board of Trade (sub-s. 6), and not to the official receiver's becoming, under s. 54, sub-s. 1, "the trustee" immediately upon adjudication and until such appointment. Therefore, the time for disclaimer by a trustee appointed under s. 21 runs from the date of the certificate of his appointment (sub-s. 4), and not from the date of the adjudication.

The official receiver, however, in becoming, under s. 54, sub-s. 1, "the trustee" immediately upon adjudication and until a trustee is appointed, may exercise the power of disclaimer given by s. 55, sub-s. 1, as amended, to "the trustee," though without being subject to the limitation of time for the exercise of that power; for this limitation runs, in terms, from a date which has no relation to the trusteeship of the official receiver, because he is never "appointed"; but, nevertheless, under sub-s. 4 of s. 55, he may be required by any person interested in the bankrupt's onerous property to decide whether he will disclaim or not.

In re Parker, (1885) 15 Q. B. D. 196, and *Turquand* v. *Board of Trade*, (1886) 11 App. Cas. 286, considered.

APPEAL from an order of a registrar refusing to extend the time for disclaimer under s. 13 of the Bankruptcy Act, 1890.

An order of adjudication against the debtor was made on October 2, 1902. Thereupon a trustee was appointed by the creditors, and his appointment was certified on October 16, 1902. As the bankrupt was possessed of certain leasehold property in Limehouse subject to onerous covenants, the trustee gave notice to the landlords of his intention to disclaim the bankrupt's interest in the lease; and on October 14, 1903, he executed his disclaimer, which was duly filed in the bankruptcy.

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On his applying for his release the Board of Trade raised objections to the disclaimer on the ground that the properties had not been disclaimed "within [twelve] months after the first appointment of a trustee," in accordance with s. 55 of the Bankruptcy Act, 1883, as amended by the Bankruptcy Act, 1890. The trustee then maintained that he was within the twelve months, which, he said, ran from October 16, 1902, the date of the certificate of his appointment, and therefore did not expire until two days after the date of his disclaimer; whereas the contention of the Board of Trade was that the twelve months ran from October 2, 1902, the date of the adjudication, and the consequent automatic "appointment" as on that date of the official receiver as "trustee," so that the disclaimer was too late.

The trustee, under the direction of the Board, then applied, under s. 13 of the Act of 1890, for leave to extend the time in which to disclaim the property. The application came before the registrar, who refused to grant an extension of time, being of opinion that no extension was necessary, since, according to his view of s. 55 of the Act of 1883, as amended by s. 13 of the Act of 1890, the time for disclaiming ran from the date of the certificate, and not from the date of the adjudication. The trustee appealed.

E. W. Hansell, for the trustee. This case is one of considerable importance as possibly imposing a serious liability upon the official receiver, since the effect of granting a release to a creditors' trustee is that the official receiver thereupon himself becomes "the trustee," under s. 82, sub-s. 4, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and, as such, succeeds to the liabilities of the creditors' trustee, including those arising out of any onerous property of the bankrupt not validly disclaimed.

The question is, therefore, as to the proper construction to be placed upon the disclaimer section of the Act, s. 55, as amended by s. 13 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). Sect. 55, as so amended, enacts, by sub-s. 1, that "Where any part of the property of the bankrupt consists of

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land of any tenure burdened with onerous covenants . . . . the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within [twelve] months after the first appointment of a trustee, disclaim the property." Looking at the scheme of the Act, so far as it can be gathered from the various sections dealing with the "trustee," the true construction of s. 55, sub-s. 1 (as amended), seems to be that the disclaimer must be made within twelve months from the date of the adjudication, that being the event on which the official receiver becomes trustee by appointment under s. 54, sub-s. 1. That sub-section says that, until a trustee is appointed, the official receiver shall be "the trustee," and that, immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee. Then sub-s. 2 says that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed. And sub-s. 3 provides that the property of the bankrupt shall pass from trustee to trustee, including the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office. Thus the date of the adjudication seems to be the date of "the first appointment of a trustee" within s. 55—that is to say, it is the date on which the appointment of a trustee comes into effective existence by the vesting of the bankrupt's property. Sect. 12 gives power to the official receiver of a debtor's estate to appoint a special manager to act "until a trustee is appointed," meaning, a trustee in whom the property vests—vests, that is, at the date of the adjudication. That section, read in connection with s. 70, sub-s. 1 (*a*), deals with the property while it is still in the "debtor."

[STIRLING L.J. Does the Act anywhere speak of the "appointment" of the official receiver as trustee?]

Not directly: he becomes trustee automatically upon the adjudication. Sect. 20, sub-s. 1, provides that on the debtor being adjudged bankrupt his property "shall vest in a trustee." Thus, from the moment of adjudication there must always be

a trustee, and in that trustee the bankrupt's property vests. Sect. 21, sub-s. 1, which provides that on adjudication the creditors may appoint a trustee, obviously applies only to a creditors' trustee, and by sub-s. 2 his appointment must be certified by the Board of Trade, the appointment, by sub-s. 4, taking effect as from the date of the certificate.

Then sub-s. 5 provides that the official receiver shall not, save as by the Act provided, be the trustee of the bankrupt's property.

Under s. 70, sub-s. 1 (*a*) and (*g*), the official receiver's power as "receiver" merges in his appointment as "trustee."

Then s. 68, sub-s. 3, says that all expressions referring to the "trustee" shall, unless otherwise provided, "include the official receiver when acting as trustee." Sect. 82, sub-s. 4, provides that on the release of the trustee, that is, the trustee appointed under s. 21, "the official receiver shall be the trustee." So that, under the Act the official receiver becomes trustee in three events: first, upon the adjudication; secondly, when a vacancy occurs; and, thirdly, after the release of the trustee appointed under s. 21, and then until the end of the bankruptcy.

Under s. 121, sub-s. 1, in summary administration in small cases, the official receiver remains, on adjudication, the trustee in the bankruptcy; and s. 125, sub-s. 5, provides that upon an order for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver as trustee thereof. It must be admitted that the Act does not in terms speak of the "appointment" of the official receiver as trustee, and that in s. 21, sub-s. 3, of the Act of 1890 the expression "appointment" is used twice in reference to a "creditor's" trustee only. But there is no difference in the position of an official receiver as trustee and a creditors' trustee; they are both in the same position and have the same powers: *In re Parker* (1); *Turquand* v. *Board of Trade.* (2)

The word "appointment" or "appointed" in the Act may apply to the official trustee, who is automatically appointed

(1) 15 Q. B. D. 196. (2) 11 App. Cas. 286, 288-9, 291.

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trustee, just as much as to the creditor's trustee. In fact, Lord Selborne speaks of the official receiver's position as trustee as an "official appointment." (1) And Lord Esher M.R., in *In re Parker* (2), also speaks of the "appointment" of the official receiver as trustee. According to the usual practice, the receiving order mentions the particular official receiver by name and constitutes him receiver, and then upon the adjudication he is by the Act in fact appointed "trustee."

[VAUGHAN WILLIAMS L.J. Has the Board of Trade ever exercised its power under s. 21, sub-s. 6, of appointing a trustee where no trustee has been appointed by the creditors?]

No; that power has never been exercised.

[VAUGHAN WILLIAMS L.J. referred to rule 298 of the Bankruptcy Rules, 1883.]

That rule clearly applies only to a creditor's trustee.

The objection to construing s. 55 as the registrar has done is that, where there is no creditors' trustee, there is no time provided by the Act within which a disclaimer by the official receiver as trustee is possible: the result of which is that the official receiver may find himself subjected to serious liabilities from which he cannot escape. So also, where a creditors' trustee has been appointed, but has afterwards been released, the official receiver, who thereupon becomes trustee until the end of the bankruptcy, may become subject to heavy liabilities from which he cannot protect himself by disclaimer; and, further, he may find himself prejudiced through his predecessor, the creditors' trustee, having failed to execute a disclaimer within the proper time, as in *In re Baker*. (3)

Upon the whole, it is submitted that the words in s. 55, sub-s. 1, "the first appointment of a trustee," mean the first time when an effective trustee comes into existence; that an adjudication does in fact operate as an official appointment of the official receiver as trustee; and that, therefore, the date of the adjudication is the date from which the twelve months limited for disclaimer runs.

Cur. adv. vult.

(1) 11 App. Cas. 286, at p. 289. (2) 15 Q. B. D. 203.
(3) (1891) 8 Morr. 116.

1905. Aug. 4. VAUGHAN WILLIAMS L.J. The question in this case is whether the time for disclaiming runs from the certificate of the appointment of the trustee, or from the adjudication.

By s. 55 of the Bankruptcy Act, 1883, as amended by s. 13 of the Act of 1890, the trustee may, by writing signed by him, at any time within twelve months "after the first appointment of a trustee," disclaim the property. These words seem certainly to refer (in the absence of anything in that Act shewing intention) to an appointment of a trustee under s. 21, which provides, by sub-s. 1, that, where a debtor is adjudicated bankrupt, or the creditors have resolved that he be adjudicated bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether creditor or not, to fill the office of trustee of the property of the bankrupt, or they may resolve to leave his appointment to a committee of inspection thereinafter mentioned; and sub-s. 2 provides that the person so appointed shall give security, in the manner prescribed, to the satisfaction of the Board of Trade, and that the Board, if satisfied with the security, shall certify that the appointment has been duly made, unless the Board objects to the appointment on certain specified grounds. Sub-sect. 4 of the same section provides that the appointment of a trustee shall take effect as from the date of the certificate.

I am inclined to think that sub-ss. 2 and 4 of this section, as to the giving of security and as to the certificate of appointment, apply only to a trustee "so appointed," that is, appointed by the creditors as provided by sub-s. 1, and have no application to the official receiver when he is the trustee. In practice no certificate is given of his appointment; no security is taken from him. It is, however, to be observed that s. 21 not only provides for the appointment of a trustee by the creditors after an adjudication, but also for the appointment of a trustee by the Board of Trade in cases where a trustee is not appointed by the creditors within four weeks from the date of the adjudication, or where negotiations for the composition scheme or schemes have been closed by the refusal of the creditors to accept, or of the Court to approve, a composition or scheme.

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Sect. 54, by sub-s. 1, provides that until a trustee is appointed the official receiver shall be the trustee for the purposes of the Act, and that immediately on the debtor being adjudicated bankrupt the property of the bankrupt shall vest in the trustee; and sub-s. 2 provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed. This property would seem to vest, having regard to the judgment of Lord Selborne in *Turquand* v. *Board of Trade* (1), independently of any appointment within the meaning of that word as used in s. 21. But then sub-s. 2 of s. 54—which provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed—in my judgment contrasts the case where the property of the bankrupt vests in the official receiver independently of any appointment of him as trustee, and the case where the property of the bankrupt passes to a trustee forthwith on his appointment. There can be no doubt but that in sub-s. 2 of s. 54 the word "appointed" is used in the sense in which it is employed in s. 21. It is true that Lord Selborne says in the case to which I have referred (1): "A certain time is allowed to the creditors to choose a trustee for themselves. If they do, when that choice is complete it supersedes the earlier official appointment"—meaning thereby, I think, the appointment of the official receiver as trustee under sub-s. 1 of s. 54. And it is also true that Lord Esher in *In re Parker* (2) says: "Sect. 20 had said that the property shall vest in '*a* trustee'; s. 54 says that the property of the bankrupt shall vest in '*the* trustee.' What trustee? There is no one but the official receiver at that moment. 'Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act.' The property of the bankrupt therefore vests in the official receiver who has just been appointed." But the use of these expressions by Lord Selborne and by Lord Esher in no way proves that the words "first appointment" in s. 55 do not exclusively refer to an appointment under s. 21.

The provisions of sub-s. 1 of s. 54 will necessarily, in every case in which the creditors appoint the trustee, make the

(1) 11 App. Cas. 286, at p. 289. (2) 15 Q. B. D. 196, 203.

official receiver the trustee before there is a creditors' trustee, because a creditors' trustee is appointed by a meeting called after the adjudication.

This brings me to s. 55, the disclaimer section, and to the question of the meaning of the words "may, by writing signed by him, at any time within [twelve] months after the first appointment of a trustee, disclaim the property." Sub-s. 1 of that section, as amended, runs thus: "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants . . . . the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within [twelve] months after the first appointment of a trustee disclaim the property." In my opinion the words "after the first appointment" refer to an appointment under s. 21 either by the creditors under sub-s. 1 or by the Board of Trade under sub-s. 6. I do not think they refer to the official receiver's becoming trustee under sub-s. 1 of s. 54 until a trustee is appointed. It follows that the twelve months mentioned in sub-s. 1 of s. 55 will run from the certificate of the first appointment of a trustee, and not from the date of the official receiver's becoming trustee, on the debtor being adjudicated bankrupt, until a trustee is appointed.

It is said that the effect of the Court so holding will be that the official receiver, being trustee, cannot exercise the power of disclaimer at all, and that this is inconsistent with the decision of the House of Lords in *Turquand* v. *Board of Trade* (1), and of the Court of Appeal in *In re Parker* (2), because the judgments both in the Court of Appeal and in the House of Lords, when the House reviewed the decision of the Court of Appeal, in effect decided that—to use the words of Lord Blackburn (3)—"Whilst the official receiver is trustee after adjudication he may exercise the powers of a trustee." But I do not think, nor do we intend that the effect of our decision shall be that the official receiver on becoming trustee will not have the

(1) 11 App. Cas. 286, 289. (2) 15 Q. B. D. 196.
(3) 11 App. Cas. 286, at p. 291.

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power to disclaim. One of the powers of the trustee appointed by the creditors is to disclaim. I think that the official receiver, as trustee, can exercise that power.

It is said that if the official receiver has that power the twelve months limited for the exercise of it must run from the vesting of the property in the official receiver—that is, from the moment of adjudication; but I do not think that this follows. The official receiver, in becoming trustee immediately upon the debtor being adjudicated bankrupt, may exercise the power of disclaimer which s. 55, as amended, gives to the trustee appointed by the creditors for twelve months from that appointment, without being subject to this limitation in time for the exercise of the power; for this limitation by its very terms runs from a date which has no relation to the trusteeship of the official receiver, because he is never "appointed."

As the twelve months from the appointment had not at the time of the application for extension expired in this case I think no extension was necessary, and that an extension was properly refused. The result is that the registrar was right, and the appeal must be dismissed.

STIRLING L.J. I agree. I merely wish to say this for myself—that the only difficulty I have felt arose from the apprehension that some injustice might be done to persons interested in onerous property by reason of there being no limit placed upon the time for disclaimer while the official receiver is trustee under sub-s. 1 of s. 54. But that difficulty is, to my mind, removed when it is considered that sub-s. 4 of s. 55 provides that any person interested in onerous property may require the trustee—which includes, as my Lord has pointed out, the official receiver when trustee under sub-s. 1 of s. 54—to decide whether he will disclaim or not.

COZENS-HARDY L.J. I agree. I have nothing to add.

Appeal dismissed.

Solicitor: *The Solicitor to the Board of Trade.*

G. I. F. C.

In re WILKINSON. *Ex parte* FOWLER.

1905 *Aug.* 10.

Bankruptcy—Contract for Works—Payment by Instalments on Engineer's Certificate—Specified Firms to supply Machinery—Power for Engineer, on Contractor unduly delaying Payment for Machinery, to order direct Payment to Firms—Receiving Order against Contractor—Subsequent Order by Engineer for direct Payment to Firms—Title of Trustee—Secured Creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 168.

In September, 1903, A. signed a contract with a local authority to construct sewage works at a price to be paid to him by monthly instalments, less 10 per cent., on the certificate of the engineer of the local authority; the 10 per cent. to be retained and paid to A. six months after completion of the works. The contract also provided that certain machinery for the works was to be supplied to A. by specified firms, and that (clause 54), "If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power if he thinks fit to order direct payment to them."

On October 12, 1904, A. was adjudicated bankrupt on his own petition. At this date the contract was substantially completed, and there was then due under it the sum of 1574*l.* 15*s.* 10*d.* only, of which 1349*l.* 17*s.* 8*d.* was retention money and 224*l.* 18*s.* 2*d.* was a sum payable on the engineer's next certificate, and these two sums were claimed by the trustee in bankruptcy. At the same date A. owed 836*l.* 8*s.* 9*d.* in various amounts to the specified firms for machinery supplied to him for the works; and subsequently the engineer in 1905 made two orders under clause 54 directing payment of the 836*l.* 8*s.* 9*d.* out of the 1574*l.* 15*s.* 10*d.* to the firms in settlement of their accounts:—

Held, that A. by presenting his own petition in bankruptcy "unduly delayed proper payment" to the machinery firms within the meaning of clause 54:

Held, also, that the power conferred by that clause on the engineer was not annulled or revoked by A.'s bankruptcy; and that the firms by virtue of the two orders of the engineer were entitled to be paid the 836*l.* 8*s.* 9*d.* out of the 1574*l.* 15*s.* 10*d.* in priority to the claim of the trustee.

THIS was an application by the trustee in bankruptcy claiming, as part of the property of the bankrupt, certain sums payable under a contract, under these circumstances.

On September 9, 1903, the Aylesbury Urban District Council entered into a written contract with the debtor (trading as a

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contractor under the style of B. Cooke & Son) for the construction of certain sewage works at the price of 11,546*l.* The material stipulations of the contract were as follows:—

3. The works were to be completed in all respects and cleared of all implements, tackle, &c., within six months from the date of the contract to the satisfaction of Mr. Chatterton or other the engineer for the time being of the council, to be testified by a certificate under his hand.

7. The price of 11,546*l.* was to be paid in monthly instalments, each instalment to be the value of the work executed by the contractor as valued by the engineer and certified under his hand, less 10 per cent. of such value. The balance of the price to be paid the contractor within six calendar months from the time when the engineer should certify the completion of the works to his satisfaction.

12. The contract was to terminate on the commission of any act of bankruptcy by the contractor.

The specification of the works, which accompanied and were part of the contract, provided:—

"10. The contractor at his own cost and charge to provide all materials, engines, pumps, machinery . . . . and plant of every kind, quality, and description . . . . that may be necessary for the due and perfect completion and maintenance of the works. . . ."

"17. The contractor shall maintain in good working order and complete repair the whole of the works above described for six calendar months from the date of the certificate of completion of the same. . . ."

18. The contractor was to be paid monthly at the rate of 90 per cent. upon the value of the completed work until the whole had been completed, delivered to, and accepted by the council. One half the balance to be paid at the expiration of three months from the date of completion and the remainder at the end of six months, provided the works were maintained in accordance with clause 17.

20 and 21 gave the council a power (which was not exercised) to determine the contract on the bankruptcy of the contractor, and to take possession and complete the works.

"52. The engineer will from time to time issue to the contractor written orders to do work, which shall be paid for out of sums provided as money in lump sums . . . . and the contractor shall put down in the bill of quantities such sum or sums as he may think fit for contractor's profit upon the machinery and other articles to be supplied by specific firms and paid for out of money in lump sums. The contractor shall produce to the engineer when required to do so the receipted bills as hereinafter referred to of the firms specified to supply the machinery and articles in question, and the net amount of such receipted bills shall be the total sum payable to the contractor in respect thereof. No payment out of sums provided as money in lump sums . . . . will be made unless the contractor produces a written order signed by the engineer covering the same."

"54. At each and every certificate in which the engineer shall deem proper to include a sum or sums for machinery, the contractor shall, upon measurement being made, produce to the authorized officer a receipt shewing that he has paid to the machinery makers the net sum to be included, notwithstanding that he has not at the time of paying such machinery makers received the said sums from the council. If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power if he thinks fit to order direct payment to them, and shall deduct from the next certificate issued to the contractor the money so paid, provided that no payment in the manner referred to shall be held to relieve the contractor from any of his liabilities under this contract."

129 provided for the supply of machinery and plant by certain specified firms.

Work went on under this contract, certificates were from time to time granted by the engineer, and payments were made by the council, until October 3, 1904, when a receiving order was made against the debtor on his own petition; and on October 12 he was adjudicated bankrupt and a Mr. Fowler became the trustee. Meanwhile, in July, 1904, the council had been served by the bankers of the debtor with notice of a

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charge in their favour on the retention moneys under the contract.

At the date of the receiving order the contract was nearly completed, all machinery had been supplied and erected, and there remained payable under the contract a sum of 1574*l.* 15*s.* 10*d.* only, made up of 1349*l.* 17*s.* 8*d.* (total retention moneys) and a sum of 224*l.* 18*s.* 2*d.*, being the balance due on the issue of the engineer's certificate of completion. The trustee completed the contract by October 24, and maintained the works for six months from that date at the cost of the debtor's estate.

During the progress of the works certain specified firms had supplied machinery for the purposes of the contract, but the engineer had not before issuing his certificate called for the receipts for the machinery, nor exercised any of the powers given him by clause 54. Various sums for machinery were, however, from time to time included in the engineer's certificate and paid the debtor in the usual way, who made payments on account from time to time to the specified firms, and at the date of the receiving order the balances due by the debtor to seven of these firms amounted altogether to 836*l.* 8*s.* 9*d.*, and some of them communicated with the engineer.

By his certificate dated February 7, 1905, the engineer, after stating that he had reasonable cause to believe that the contractors, Messrs. Cooke & Son, were unduly delaying proper payment to the firms supplying the machinery, ordered direct payment of the 224*l.* 18*s.* 2*d.* to the seven firms in certain proportions on account of the sums due to them from the debtor; and on February 8 he gave a certificate that the works had been completed on October 24 to his satisfaction, and further certified that, after allowing for the 1349*l.* 17*s.* 8*d.* to be retained during maintenance of the works and the 224*l.* 18*s.* 2*d.* by the order of February 7 directed to be paid directly to the machinery firm, the contractors were not then entitled to receive any money.

On April 5 the engineer issued another certificate, similar in terms to that of February 7, and thereby ordered direct payment of the sum of 611*l.* 10*s.* 7*d.* (making with the 224*l.* 18*s.* 2*d.* the total sum of 836*l.* 8*s.* 9*d.*) in various amounts to the seven

firms in settlement of their accounts; and on April 24 he gave his final certificate that the works had been maintained to his satisfaction, and that, after deducting from the retention money the 611*l.* 10*s.* 7*d.* directed by the order of April 5 to be paid to the machinery firms, the contractors were entitled to be paid the balance of 738*l.* 7*s.* 1*d.*

In July the trustee applied in the bankruptcy for an order on the council to pay him the 1574*l.* 15*s.* 10*d.* as part of the property of the bankrupt divisible amongst his creditors, subject only to the charge to the bankers on the retention moneys, which charge had been agreed at 1220*l.* The machinery firms were also made respondents to the application, and on its coming on for hearing it was agreed by all parties that no objection should be taken to the jurisdiction of the Bankruptcy Court to decide the issues raised by the application.

S. G. Lushington, for the trustee. Clause 54 was inserted for the benefit and protection of the council in order that the progress of the works might not be unduly delayed during construction by reason of the machinery firms refusing to supply machinery because of the contractor failing to pay them for machinery actually delivered. Direct payment would relieve the council from all fear of delay on this account. But all the machinery had been supplied and set up by October 24; therefore no benefit could accrue to the council by the engineer afterwards exercising the power in February and April, 1905. Further, on the bankruptcy of the debtor the contract vested in the trustee in bankruptcy, and he then became "the contractor" under the contract. At that date the engineer had not exercised his powers under clause 54, and the machinery firms were unsecured creditors in respect of the unpaid balances of their accounts; and it is obvious that down to that date the engineer had not had reasonable cause for believing that the debtor was "unduly delaying proper payment," because the firms were giving credit and were being paid from time to time, and no receipts had been called for. After that date it could not be said that the trustee was guilty of undue delay, because the only proper payment he could make was by way of dividend,

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and he could not pay a dividend until he had assets in hand available for that purpose. In the next place, the power was revoked by the bankruptcy of the debtor, and could not afterwards be exercised for the benefit of the machinery firms who were unsecured creditors at the date of the receiving order; and the subsequent orders of the engineer did not make them secured creditors within the meaning of s. 168 of the Bankruptcy Act: *In re Hallett & Co.* (1) Lastly, the trustee completed the works and maintained them for the six months, and the retention moneys vested in him subject only to the right of the council to hold them as security during the period of maintenance, and the engineer had no right to dispose of them by the order of April 5.

A. A. Hudson, for three of the machinery firms. The stipulations of the contract, especially clauses 52 and 54, shew that the council intended to retain some control and direction over the moneys they were to pay under the contract, especially with regard to the goods to be supplied by machinery firms. It is reasonable to suppose that such firms would not supply their goods to any contractor whom the council might choose to employ, or to a contractor of whom they knew nothing, unless they had some guarantee that their accounts would be paid, and clause 54 is intended to give them that protection. The clause is as much for their benefit and protection as for that of the council. As to these firms being unsecured creditors, long before the bankruptcy, in fact on the signing of the contract, the bankrupt by clause 54 authorized the engineer in certain events to order direct payment by the council to the machinery firms. That was a power or authority which the bankrupt could not revoke; and his trustee in bankruptcy, who has adopted and completed the contract, has no higher rights than the bankrupt, and is bound by all the stipulations of the contract. Further, the event contemplated by clause 54 has happened, because the bankrupt by filing his own petition put it beyond his power to pay these firms, and the engineer has ordered direct payment to them. Lastly, the decision of the engineer under the contract that he had "reasonable

(1) [1894] 2 Q. B. 237.

cause to believe that the contractor was unduly delaying payment to the machinery firms" is final and conclusive, and cannot be impeached unless he acted malâ fide, which is not suggested.

G. D. Pepys, *W. Glynn*, and *W. E. Ball*, for the other machinery firms, argued to the same effect.

Clayton, for the council.

Mr. A. N. Stephens (solicitor), for the bank. It may be conceded that, if the machinery firms are entitled to be paid under the two orders of the engineer, they have priority over the bank.

S. G. Lushington, in reply.

BIGHAM J. I doubt whether without the consent of all parties I should have had jurisdiction to deal with this application; but as all parties have consented, I will decide the questions that have been raised. The trustee claims as part of the property of the bankrupt divisible amongst his creditors two sums of money payable by the Aylesbury Urban District Council under the contract of September 9, 1903, which they entered into with the bankrupt. It was a contract for the construction of certain sewage works, and the sums remaining unpaid under that contract are a sum of 224*l.* 18*s.* 2*d.* and the retention moneys, amounting to a sum of 1349*l.* 17*s.* 8*d.* It is those two sums, making together the sum of 1574*l.* 15*s.* 10*d.*, that are claimed by the trustee. Now certain other parties claim to be entitled to part of these moneys. They are the firms who supplied the contractor with machinery for these sewage works, and who have not been paid. They allege that by virtue of the contract and the circumstances under which the goods were supplied they are entitled to be paid out of these two sums, in priority to the trustee, the amount of their unpaid accounts. Now the contract contains a provision on which, in my judgment, the whole question turns. It is clause 54. [The learned judge read the clause, and continued:—] That clause, in my opinion, is inserted in the contract for the benefit, not only of the people who supply the machinery, but also of the council itself. It is very much to the interest of the council to see that contracts of this kind for public works

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into which they enter are carried out in a manner satisfactory to all persons who are concerned in the performance of them. The council certainly may, and no doubt frequently do, make contracts of this kind, and they make them much more advantageously when the people who supply the machinery or other goods which are to be used by the contractor in the performance of the contract know that there is a reasonable probability that they will be paid. The council are enabled, by inserting a clause of this kind in their contract, to give a certain amount of confidence to people who supply goods to the contractor, and in that way they are placed in a better position when they come to make contracts again than they otherwise would be; and, therefore, I say that the clause is inserted, not only in the interests of the persons who supply goods to the contractor, but also in the interests of the council themselves. Now what is the meaning of the clause? I think it means that, if the persons supplying machinery to the contractor for the purpose of the contract are not promptly and properly paid by him, they can apply to the engineer, and then it shall be competent for the engineer to intervene and, by a proper certificate given in that behalf, to require the council to pay to the machinery firms the amount of their accounts directly—that is to say, not through the hands of the contractor at all, but the money is to be paid directly by the council to the machinery firms. That is the meaning of the clause. It amounts to an authority given by the contractor—that is to say, by the bankrupt in this case—to the engineer representing the council to dispose of money, which would otherwise come to the bankrupt, in a certain way under certain circumstances. It is an authority which, in my opinion, it was not competent for the bankrupt to withdraw, and it was never contemplated he should withdraw it; and, indeed, it is not contended on behalf of the trustee that the authority was one that could be lawfully withdrawn. It is an authority, therefore, which the bankruptcy of the contractor did not annul. I have then to see whether that authority has been properly exercised. Now what happened was this. On October 3, after the machinery had been supplied the

contractor filed his own petition and was adjudicated a bankrupt—that is to say, by his own act he put it out of his power to pay for the machinery which had been supplied to him. In my opinion that very act amounted to "unduly delaying proper payment" of the machinery firms within the meaning of clause 54. He prevented himself, by his own misfortune no doubt, from making proper and due payment. I think it would have been competent at that very moment for the engineer to have given the certificate which, as I shall mention in a moment, he subsequently did give directing that the moneys should be paid direct by the council to the firms supplying the machinery. He, however, did not give the certificate then, but on February 7, 1905, long after the bankruptcy and long after the title of the trustee had accrued, he gave a certificate by which he certified that certain sums of money, which I need not specify, were due to certain firms who had supplied machinery. His certificate begins: "Having reasonable cause to believe that the contractors, Messrs. Cooke & Son"—that is the name under which the bankrupt traded—"are unduly delaying proper payment to the firms supplying machinery, I hereby under the terms of the contract direct payment to those firms who are hereunder named of the sums respectively payable," and that he signs. I repeat that, in my opinion, the circumstances were such as to give the engineer power to execute the provisions of clause 54. He did so, and, as that power or authority never was revoked, in my opinion it binds the trustee in bankruptcy just as much as it would have bound the contractor himself if he had never been made a bankrupt. The day after the engineer gave that certificate he gave a certificate to the effect that the bankrupt or the bankrupt's estate was entitled to receive the balance of the contract money, less the retention money of 10 per cent. which the council were entitled to retain under the terms of the contract during the maintenance of the works, and less the amount of the order or certificate of February 7. Later on, on April 5, 1905, the period during which the maintenance clauses under the contract were in operation came to an end, and the contractor, if he had not been a bankrupt, would have been entitled

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to the retention money. Then what the engineer did, and I think he had power to do it, was to certify that the machinery firms, having been delayed in the manner before described, were entitled to be paid direct out of the retention money the balance of their accounts, and he gave a certificate accordingly on the same April 5. In my opinion he gave that certificate with authority and under circumstances that justified him in directing that these firms were to receive out of the retention money the balance of their accounts. I will make an order for payment by the council direct, in accordance with the certificates of February 7 and April 5, of the sum of 836*l.* 8*s.* 9*d.* to the machinery firms, and the balance will go to the bank.

Solicitors for trustee: *Parker, Garrett & Co.*

Solicitors for council: *Nicholson & Crouch, for P. A. Wright, Aylesbury.*

Solicitors for other respondents: *Hind & Robinson; G. D. Perks; Nash, Field & Co.; G. Reader & Co.; Stephens & Sons.*

H. L. F.

SYMONS, Appellant *v.* BAKER, Respondent.

1905
Aug. 4.

Ship—Vessel employed in coaling Ships of Navy—King's Ship—Pilotage Dues—Liability of Master—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 591, 741—*Bristol Channel Pilotage Act*, 1861 (24 & 25 *Vict. c. ccxxxvi.*), *s.* 35.

Sect. 741 of the Merchant Shipping Act, 1894, provides that the Act "shall not, except where specially provided, apply to ships belonging to Her Majesty."

A vessel owned by the Government and entered in the Navy List as employed on harbour service was exclusively employed under the Admiralty by the Devonport Dockyard authorities in carrying coal to ships of the Royal Navy. Her master held a Board of Trade certificate, and neither he nor the crew, who were engaged under articles of agreement, were in the navy. The master employed pilots, and proceedings were taken against him in a Court of summary jurisdiction under s. 591 of the Merchant Shipping Act, 1894, for the recovery of pilotage dues according to a scale imposed by by-laws made in pursuance of the Merchant Shipping Act, 1894, and a local Act (in which the Crown was not mentioned) under which the pilots were licensed:—

Held, that the vessel was a King's ship, and that the master was therefore not liable either under the Merchant Shipping Act or the local Act to pay pilotage dues on the scale imposed by the by-laws.

Case stated by the deputy stipendiary magistrate for the county borough of Cardiff.

At the Cardiff Petty Sessions a complaint was preferred by the respondent against the appellant under s. 591 of the Merchant Shipping Act, 1894, and the by-laws, made and confirmed by Order in Council pursuant to ss. 582 and 583 of the Act, called "Pilotage Rates, By-laws, and Regulations for the Government of Pilots acting under the Bristol Channel Pilotage Act, 1861," for the recovery of the sum of 4*l.* 4*s.* in respect of a claim for dues for the pilotage of the steamship *Kharki* from Penarth Roads to Roath Basin, Cardiff, on two occasions, and from Roath Basin to Penarth Roads on two occasions.

Upon the hearing of the complaint the following facts were proved or admitted.

The *Kharki* (net register tonnage 338·24 tons) was a coal

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vessel owned by His Majesty's Government. She was a collier exclusively engaged in going backwards and forwards to various ports carrying coal for the navy. She flew the Devonport Dockyard flag, but not the navy flag, and she did not carry guns. She was not registered under the Merchant Shipping Act, 1894, but had been surveyed by the Board of Trade in accordance with rule 1 of that Act. She appeared in the Navy List under the heading, "List of Small Steam Vessels, Tugs, &c., employed on Harbour Service."

The appellant held a Board of Trade certificate as master mariner, and was employed as master of the *Kharki* by the dockyard authorities at Devonport, under the Admiralty, and acted on instructions received from the coaling officer at Devonport Dockyard. He was not an officer of the Royal Navy. The crew of the vessel were engaged at the dockyard under articles of agreement. Some of the crew were navy pensioners.

The respondent was a licensed pilot for the port of Cardiff, and at the request of the appellant he piloted the *Kharki* on May 5 from Penarth Roads to the Roath Basin, Cardiff; on May 6 from the Roath Basin to Penarth Roads; on May 12 from Penarth Roads to the Roath Basin; and on May 13 from the Roath Basin to Penarth Roads.

Pilotage is not compulsory in the port of Cardiff.

The dues charged by the respondent for the pilotage of the *Kharki* were the dues authorized by the by-laws to be charged for vessels of her tonnage.

On the completion of each pilotage service rendered by the respondent the appellant handed him a certificate.

On May 20, 1904, the respondent sent to the appellant a demand in writing for payment of the said dues.

By-law 2 of the "Pilotage Rates, By-laws, and Regulations for the Government of Pilots acting under the British Channel Pilotage Act, 1861," made pursuant to s. 582 of the Merchant Shipping Act, 1894, and approved and confirmed by Order in Council dated May 20, 1903, provides that: "Every licensed pilot who may be employed to pilot any ship or vessel to any dock, harbour, or basin in the port of Cardiff, from any point

in Penarth Roads or vice versâ shall be paid according to the registered tonnage of such vessel as follows:—

"If 300 tons and under 400 tons, 1*l.* 1*s.*"

On the part of the appellant it was contended, first, that the *Kharki* was a ship belonging to His Majesty within the meaning of s. 741 of the Merchant Shipping Act, 1894, and that inasmuch as the Act neither made a provision for the application of s. 591 to the King's ships nor conferred power on the pilotage authority to fix dues for the pilotage of such ships, the appellant, as master of the *Kharki*, was not liable to pay the pilotage dues claimed, and that the magistrate had no jurisdiction to adjudicate upon the claim; secondly, that by the common law the Crown was not liable for statutory dues or bound by any statute except where expressly bound therein; thirdly, that the appellant was not legally responsible for the payment of the dues, because the services were ordered by him in his capacity as a public officer and an agent for the Crown, and the public revenue could not be reached by means of an action against him.

On the part of the respondent it was contended, firstly, that s. 741 merely placed King's ships on a different footing from other ships in that they were not liable to be proceeded against in rem, and that the section did not preclude an action from being successfully maintained against the master of a ship belonging to His Majesty in respect of tort or breach of contract; secondly, that the *Kharki* was not a ship belonging to His Majesty within the meaning of s. 741, and that the appellant, as master, was therefore personally liable under s. 591 to pay the dues claimed by the respondent.

The magistrate was of opinion that the *Kharki* did not perform the services of a King's ship, but was a dockyard vessel or "yard craft" used exclusively for commercial purposes by the dockyard authorities at Devonport, and he therefore held that she was not a ship belonging to His Majesty within the meaning of s. 741 of the Merchant Shipping Act, 1894, and that the appellant as her master was therefore liable under s. 591 of the Act to pay the dues claimed.

The magistrate accordingly gave judgment for the respondent for the amount claimed.

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The question for the Court was whether the magistrate came to a correct determination in point of law. (1)

Sir R. B. Finlay, *A.-G.*, and *W. Wills*, for the appellant. This vessel was a King's ship. She was not engaged in any commercial enterprise, but was exclusively employed in the service of the Crown: *Cargo ex Woosung*. (2) *The Cybele* (3) is distinguishable. The vessel there was a Ramsgate Harbour tug, and with the rest of the harbour property became vested in the Board of Trade, but she did not perform any of the services of a King's ship. This vessel, being a King's ship, comes within s. 741 of the Merchant Shipping Act, 1894, and is exempt from all the provisions of the Act. The contention that s. 741 only exempts King's ships from proceedings in rem is untenable. There is no mention of the Crown in the Bristol Pilotage Act, 1861, and therefore neither under that Act nor under the Merchant Shipping Act, 1894, is this vessel liable to

(1) Sect. 591 of the Merchant Shipping Act, 1894: "(1.) The following persons shall be liable to pay pilotage dues for any ship for which the services of a qualified pilot are obtained, namely:—

"(*a*) the owner or master;

"(*b*) as to pilotage inwards, such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port of her arrival or discharge;

"(*c*) as to pilotage outwards, such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port from which she clears out;

and these dues may be recovered in the same manner as fines of like amount under this Act, but that recovery shall not take place until a previous demand has been made in writing."

Sect. 681, sub-s. 2: "Where under this Act any sum may be recovered as a fine under this Act that sum, if recoverable before a Court of summary jurisdiction, shall in England be recovered as a civil debt in manner provided by the Summary Jurisdiction Acts."

Sect. 741: "This Act shall not, except where specially provided, apply to ships belonging to Her Majesty."

The Bristol Channel Pilotage Act, 1861 (24 & 25 Vict. c. ccxxxvi.), s. 35: "It shall be lawful for the Board to levy demand and receive from the master, or owner, or consignee of every vessel coming into or going out of the port for which such Board may have been appointed, and who shall have required and obtained the assistance of a pilot, such reasonable rates for pilotage as may from time to time be provided by the by-laws to be made by such Board for such purpose; and such Board shall at all times maintain an efficient staff of pilots."

(2) (1876) 1 P. D. 260.

(3) (1878) 3 P. D. 8.

pilotage dues under these by-laws; nor is the master personally liable: *Gidley* v. *Lord Palmerston*. (1) It is not disputed that a King's ship is liable to pay what is reasonable for pilotage services, but the only method by which payment can be enforced is by petition of right.

Pickford, K.C., and *John Sankey* (*Herman Cohen* with them), for the respondent. On the facts found in the case this vessel cannot be held to be a King's ship. It is true she belonged to the Government, but so did the tug in *The Cybele* (2); therefore that test is not sufficient. As was said by Thesiger L.J. in that case, the term "King's ship" is used in the ordinary natural sense: "It is not intended to include every case in which every department of Her Majesty's service thinks proper to use a vessel for that service." In the present case neither the master nor the crew are in the navy, and in many essentials the vessel differs from an ordinary King's ship. But, even if the *Kharki* is a King's ship, the appellant is liable, because s. 35 of the Bristol Pilotage Act, 1861, imposes a personal liability on the master "of every vessel" entering or leaving the port, and it is submitted that includes King's ships. The Attorney-General reads that section as meaning every ship not belonging to His Majesty; but, if so, s. 31 of the Act, which imposes a penalty on pilots refusing to give their services when required, must be read in the same way, and it follows that a King's ship would not be able to enforce pilotage. Reading ss. 31 and 35 together, it is clear that they must be taken to apply to King's ships. [He referred to *Palmer* v. *Hutchinson*. (3)]

The Attorney-General, in reply. It is not necessary to consider the effect of s. 31 of the local Act, but there is a distinction between an Act of Parliament which confers rights on the Crown and one which imposes obligations.

LORD ALVERSTONE C.J. The point raised in this case is one of very considerable difficulty, and though I have arrived at the conclusion that the appeal must be allowed, I feel that there are strong arguments in favour of both sides. I am

(1) (1822) 3 B. & B. 275; 24 R. R. 668. (2) 3 P. D. 8.
(3) (1881) 6 App. Cas. 619.

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unable to agree with the view of the magistrate that a different rule has to be applied because this vessel was employed for what the magistrate terms commercial purposes, by which he means, I suppose, that she carried coal for the supply, from time to time, of His Majesty's ships. I do not think that there was anything commercial in that employment. The vessel was what may be called a coal tender, and was used solely as a tender taking coal to ships of the navy. I do not understand why any distinction is to be drawn between the service of an ordinary ship of the navy and the most useful but less dignified work which this vessel was performing. In my opinion the vessel in question is clearly a King's ship, and therefore she comes within the exemption conferred by s. 741 of the Merchant Shipping Act, 1894.

I think, therefore, that we have to consider whether the decision of the magistrate can be supported on one of two grounds—either that a King's ship is liable under the Bristol Channel Pilotage Act to pay the pilotage dues imposed by these by-laws, or that the master of a King's ship, if he chooses to employ a pilot, is personally liable. I have come to the conclusion that the language of the Bristol Pilotage Act is not sufficient to make the King's ship liable to pay pilotage dues on the scale contemplated by these by-laws. It seems to me that, whatever may be the rights, duties, and obligations of pilots who are summoned to pilot the King's ships, it cannot be said, in the absence of express language, that there is a necessary implication that the public revenue, by petition of right, can be called upon to pay the scale of pilotage dues which have been imposed by the by-laws. In my opinion, the Bristol Pilotage Act and the Merchant Shipping Act combined are not sufficient to create a debt against the Crown in respect of pilotage services rendered. I have not overlooked the argument of Mr. Pickford that this conclusion has the effect of depriving the Crown of certain rights under the Bristol Pilotage Act; but I agree with the view presented by the Attorney-General, that the two questions are not necessarily dependent upon exactly the same considerations. I think it is possible that the Crown may get the benefit of certain general

enactments by way of privilege, although it does not incur the obligations which would arise if the Crown were liable to other provisions.

Then as to the other point, that the master is liable because he, as master, has ordered the pilotage, I do not think that that can be maintained. The master of a King's ship acts as master on behalf of the Crown; he is an agent in the ordinary sense of the word; and, unless it can be clearly implied that the obligation to pay pilotage dues was to be a personal obligation upon the master, the argument goes too far. If the King's ships are not liable to pay dues under these by-laws, then one cannot find a contract, based upon the statute, making the master personally liable. To do so would be a direct contradiction of the provision of the Merchant Shipping Act, which expressly exempts the Crown. The only way in which it could be suggested that any contract or obligation was created on the part of the master would be, as was indicated in *Palmer* v. *Hutchinson* (1), by shewing grounds for alleging a contract on the part of the Crown which could be enforced by petition of right.

For these reasons I think this appeal must be allowed.

LAWRANCE J. I agree.

RIDLEY J. I agree. The chief difficulty I have felt is as to the point raised by Mr. Pickford on the interpretation of the Bristol Pilotage Act; but as His Majesty's ships are not mentioned in that Act, I think it is better to follow the rule that the Act therefore does not apply to them. I entertain no doubt that this vessel is a King's ship.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *Stephens, David & Co., Cardiff.*

(1) 6 App. Cas. 619.

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Aug. 1, 4.

THE KING *v.* BRAILSFORD AND ANOTHER.

Criminal Law—Conspiracy—Indictment—Obtaining a Passport by False Representations—Direction to Jury—Matter of Law—Acts tending to produce a Public Mischief.

An indictment against two defendants for conspiracy alleged that the defendants unlawfully conspired to obtain a passport in the name of one of the defendants from the Foreign Secretary by falsely pretending and representing that the said defendant desired to use the passport himself while travelling in Russia with intent that the passport should be used by another person in the name of the said defendant, and that the defendants in pursuance of the conspiracy sent the passport to the other person for use by him in Russia, in fraud of the Foreign Office regulations for the issue of passports, to the injury and prejudice and disturbance of the lawful, free, and customary intercourse between the subjects of the King and those of the Czar of Russia, to the public mischief of the subjects of the King, and to the endangerment of the continuance of the peaceful relations between the King and the Czar and their subjects respectively:—

Held, that the indictment was good.

At the trial of the indictment evidence was given on behalf of the Crown that the defendants combined and conspired together to obtain, and did in fact obtain, from the Foreign Office by false and fraudulent pretences and representations a passport in the name of the defendant McCulloch for his use in Russia with the intent that it should be used in Russia by some other person, and that in fact it was so used with their knowledge and consent. The judge directed the jury as matter of law that those acts, if proved, tended to produce a public mischief, and that the defendants had committed the offence charged in the indictment:—

Held, that this direction was right.

MOTION in arrest of judgment.

An indictment was preferred against the defendants Henry Noel Brailsford and Arthur Henry Muir McCulloch, of which the first count was as follows:—

Central Criminal Court to wit. } The jurors for our Lord the King upon their oath present that heretofore and at the time of the committing of the offence in this count charged and stated the principal Secretary of State for Foreign Affairs acting on behalf of our said Sovereign Lord the King has granted and continues to grant to liege subjects of our said

Lord the King intending to travel in certain foreign countries amongst others in the dominions of the Czar (1) of Russia passports under the hand of our said Lord the King's principal Secretary of State for Foreign Affairs in pursuance of the friendly and peaceable relations now and heretofore existing between our said Lord the King and the said Czar of Russia and their subjects respectively the same passports being addressed to all those in the said dominions of the Czar of Russia whom it may concern requesting and requiring them in the name of our said Lord the King to allow the said liege subjects of our said Lord the King being in possession of and producing such passports granted as aforesaid to pass freely and without let and hindrance and to afford them every assistance and protection of which they may stand in need when travelling in the said dominions of the Czar of Russia And the jurors aforesaid upon their oath aforesaid do further present that the said passports are so granted by and with the authority of our said Lord the King as aforesaid to British-born liege subjects of our said Lord the King under certain regulations issued by and with the authority of the said principal Secretary of State for Foreign Affairs which require the production of a certain declaration by such liege subject intending to travel to and in the dominions of the Czar of Russia with such passport as aforesaid wherein and whereby he the said liege subject declares that he is a British subject and has not lost the status of a British subject, the said declaration being verified by a certain other declaration made by a certain person resident in the United Kingdom following one of certain specified professions and employments declaring to the best of his knowledge and belief that the said declaration theretofore made by the said liege subject was true and that such liege subject was then and there a fit and proper person to receive such passport as aforesaid and which regulations further require that the said liege subject to whom such a passport as aforesaid has been issued under the hand of the said principal Secretary of State for Foreign Affairs of our said Lord the King should sign such

(1) *Sic.* Neither the Polish form "Czar" nor the Russian "Tsar" is in fact the official style of the Emperor of Russia.—F. P.

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passport as soon as he receives it from the said principal Secretary of State and thereafter before commencing to travel in the said dominions of the Czar of Russia the said liege subject should present the same for examination at the Russian Consulate General in London And the jurors aforesaid upon their oath aforesaid do further present that heretofore and at the time of the commission of the offence hereinafter in this count charged and stated the liege subjects of our said Lord the King who had complied with the said regulations lastly hereinbefore mentioned were wont to travel to and in the dominions of the Czar of Russia with such passports so granted as aforesaid and whilst travelling in the said dominions upon their lawful business or pleasure to receive and obtain under and in pursuance of the request of our said Lord the King contained in the said passport so issued as aforesaid, assistance and protection and permission to pass freely and without let and hindrance from those in the said foreign State to whom the said passport was addressed And the jurors aforesaid upon their oath aforesaid do further present that Henry Noel Brailsford and Arthur Henry Muir McCulloch well knowing the premises on the 1st day of October A.D. 1904 and on divers other days thereafter and between that day and the day of the taking of this inquisition in the county of London and within the jurisdiction of the Central Criminal Court unlawfully did conspire combine confederate and agree together and with divers other persons whose names are to the jurors aforesaid unknown unlawfully and fraudulently by divers false pretences and misrepresentations to wit under and by virtue of a certain declaration made under and in pursuance of the said regulations hereinbefore mentioned and subscribed by him the said Arthur Henry Muir McCulloch and verified by a certain other declaration made and subscribed by one Bertram Christian barrister-at-law and resident in the United Kingdom which said declaration so signed by the said Arthur Henry Muir McCulloch as aforesaid was followed by an application for a passport for the purpose of travelling to and in the said dominions of the Czar of Russia which said application falsely to the knowledge of them the said Henry Noel Brailsford and Arthur Henry Muir McCulloch

and to the said other persons whose names are unknown pretended and represented that he the said Arthur Henry Muir McCulloch truly applied for and desired such a passport as aforesaid to be issued to himself for the purpose of himself travelling to and in a foreign State to wit to and in the said dominions of the Czar of Russia whereas in truth and in fact the said Arthur Henry Muir McCulloch did not truly apply for and desire such passport to be issued to himself for the purpose of himself travelling to and in the said dominions of the Czar of Russia to obtain from and cause to be issued by the Most Honourable the Marquess of Lansdowne K.G. the principal Secretary of State for Foreign Affairs of our said Lord the King and from Herbert Stanley Martin a passport to and in the name of the said Arthur Henry Muir McCulloch as a liege subject of our said Lord the King recommending and entitling him to the exercise and enjoyment of the privileges afforded to the liege subjects of our said Lord the King while travelling with and in possession of such passports as aforesaid by his Imperial Majesty the Czar of Russia while travelling in the dominions of the Czar of Russia and requesting and requiring all those in the said dominions of the Czar of Russia whom it may concern in the name of our said Lord the King to allow the said Arthur Henry Muir McCulloch as a British subject to pass freely without let or hindrance and to afford him the said Arthur Henry Muir McCulloch as such British subject every assistance and protection of which he might stand in need in order that and with intent that the said passport having been so issued as aforesaid to and in the name of the said Arthur Henry Muir McCulloch under and by virtue of the said declaration and application the said application being false in the said particular as aforesaid to the knowledge of them the said Henry Noel Brailsford and the said Arthur Henry Muir McCulloch and the said other persons whose names are unknown should thereafter be wrongfully and fraudulently used by some person whose name is unknown other than the said liege subject of our said Lord the King to wit the said Arthur Henry Muir McCulloch for the purpose of travelling to and in the said dominions of the Czar of Russia in the name of and as the said Arthur Henry Muir McCulloch

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and as a liege subject of our said Lord the King and as the person to whom the said passport had been theretofore so issued in accordance with the said regulations as aforesaid by the said principal Secretary of State for Foreign Affairs on behalf of our said Lord the King and in order that and with the intent that the said person whose name is unknown while so travelling in the said dominions of the said Czar of Russia with the said passport and as and in the name of the said Arthur Henry Muir McCulloch should enjoy the privileges and assistance customarily afforded by the subjects of the said Czar of Russia to the liege subjects of our said Lord the King while travelling in the said dominions with and in possession of a passport so issued as aforesaid And the jurors aforesaid upon their oath aforesaid do further present that the said Henry Noel Brailsford and the said Arthur Henry Muir McCulloch and the said other persons whose names are unknown afterwards to wit on the 28th October A.D. 1904 in pursuance of and according to the said conspiracy combination confederacy and agreement amongst themselves had as aforesaid did cause and procure to be forwarded to and placed before the said Most Honourable Marquess of Lansdowne K.G. and Herbert Stanley Martin at the Foreign Office in Downing Street London a certain declaration dated the 25th October A.D. 1904 signed by the said Arthur Henry Muir McCulloch and a certain other declaration signed by the said Bertram Christian which said declarations are in the words following that is to say :—

"London Oct. 25, 1904.

"I the undersigned Arthur Henry Muir McCulloch residing at Ardwall Gate House N.B. at present residing at 9 Berwick Street All Saints Manchester hereby declare that I am a British-born subject having been born at Edinburgh on the 25th day of July 1860 and not having lost the status of British subject thus acquired and I hereby apply for a passport for the purpose of travelling to Russia.

"Arthur Henry Muir McCulloch."

"And I the undersigned Bertram Christian, barrister-at-law residing at 1 Temple Gardens E.C. hereby declare to the best of my knowledge and belief the above-made declaration

of the said Mr. A. H. M. McCulloch is true and that he is a fit and proper person to receive a passport.

"Bertram Christian."

And the jurors aforesaid upon their oath aforesaid do further present that the said Henry Noel Brailsford and Arthur Henry Muir McCulloch and the said other persons whose names are unknown afterwards to wit upon the said 28th day of October A.D. 1904 in further pursuance of the said unlawful conspiracy combination confederacy and agreement did cause and procure to be delivered to them under and by virtue of the said declarations and application lastly hereinbefore set forth a certain passport signed by the said Most Honourable Marquess of Lansdowne K.G. which said passport is in the words following that is to say:—

"We Henry Charles Keith Petty FitzMaurice, Marquess of Lansdowne, Earl Wycombe, Viscount Caln and Calnstone and Lord Wycombe, Baron of Chipping Wycombe, Baron Nairne, Earl of Kerry and Earl of Shelburne, Viscount Clanmaurice and FitzMaurice, Baron of Kerry, Lixnaw and Dunkerron, a Peer of the United Kingdom of Great Britain and Ireland, a member of His Britannic Majesty's Most Honourable Privy Council, Knight of the Most Noble Order of the Garter &c. &c., His Majesty's principal Secretary of State for Foreign Affairs, request and require in the name of His Majesty all those whom it may concern to allow Mr. Arthur Henry Muir McCulloch (a British subject) travelling to Russia to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need.

"Given at the Foreign Office London the
28th day of October 1904.

"Lansdowne."

And the jurors aforesaid upon their oath aforesaid do further present that the said Henry Noel Brailsford and the said Arthur Henry Muir McCulloch and the said other persons whose names are unknown afterwards and in further pursuance of the said unlawful conspiracy combination confederacy and agreement

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did cause and procure to be signed upon the said passport by some person whose name is unknown other than the said Arthur Henry Muir McCulloch a signature purporting to be the signature of the said Arthur Henry Muir McCulloch under the words appearing upon the face of the said passport lastly hereinbefore set forth to wit under the words "Signature of the Bearer." And the jurors aforesaid upon their oath aforesaid do further present that the said Henry Noel Brailsford and the said Arthur Henry Muir McCulloch and the said other persons whose names are unknown in further pursuance of the said unlawful conspiracy combination confederacy and agreement to wit upon the 14th day of November A.D. 1904 did produce the said passport lastly hereinbefore set forth at the Consulate General of Russia at 17 Great Winchester Street London and then and there procured the same to be visaed and signed by the Russian Consul General, Baron Ungern Sternberg And the jurors aforesaid upon their oath aforesaid do further present that the said Henry Noel Brailsford and Arthur Henry Muir McCulloch and the said other persons whose names are unknown in further pursuance of the said conspiracy combination confederacy and agreement did send and cause and procure to be sent the said passport lastly hereinbefore set forth having then thereon the visé and signature of the said Russian Consul General out of the United Kingdom to a certain person or persons unknown for use when in Russia by a certain person whose name is unknown other than the said Arthur Henry Muir McCulloch with the intent and purpose that the said passport should be so used in the dominions of the Czar of Russia by the said person whose name is unknown as aforesaid to the evil example of all others in the like case offending in contempt of our said Lord the King and his laws in fraud of the said regulations issued by and with the authority of the said principal Secretary of State for Foreign Affairs to the injury and prejudice and disturbance of the lawful free and customary intercourse existing between the liege subjects of our said Lord the King and the subjects of the said Czar of Russia to the public mischief of the said liege subjects and to the endangerment of the continuance of

the peaceful relations between our said Lord the King and the said Czar of Russia and their subjects respectively and against the peace of our said Lord the King his Crown and dignity.

The indictment contained a second count, alleging that the defendants had obtained a passport by similar false pretences, but not alleging a conspiracy.

At the trial before Lord Alverstone C.J. and a special jury in the King's Bench Division the jury found both defendants guilty on the first count of the indictment, and the jury were discharged without giving any verdict on the second count.

On this verdict judgment was entered for the Crown, but a stay was granted in order that a motion in arrest of judgment might be made to the Divisional Court on the ground that the facts alleged in the first count of the indictment did not amount to a criminal conspiracy.

July 31. *Sir Robert Reid, K.C.* (*J. A. Simon* with him), for the defendants, in support of the motion. The first count of the indictment discloses no offence known to the law. It does not allege that the passport was obtained with intent to endanger the continuance of the peaceful relations between this country and Russia, and in the absence of that intent there was no criminal conspiracy, for a combination to do an act not criminal in itself, without any wrongful intent, is not a criminal conspiracy, even though public mischief does in fact result. In order to support this indictment the Crown must, therefore, shew that a combination to obtain a passport in the name of A. for the use of B., without any wrongful intent, is a criminal conspiracy. In Wright on Criminal Conspiracies, at p. 28, the cases as to combinations against the Government are classified, but none of them affords any analogy to the present case.

[LORD ALVERSTONE C.J. It must not be assumed that obtaining a passport by false declarations is not an offence apart from combination.]

No authority can be found to support the proposition that an individual could be indicted for obtaining a passport in the

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name of one person, to be used by some one else. The facts cannot be brought within any known category of offences. It might just as well be contended that it is a criminal offence for an individual to publish an article in a newspaper which has a mischievous effect on our international relations. In Stephen's Digest of the Criminal Law (5th ed.), art. 179, acts involving public mischief are dealt with under the heading "Undefined Misdemeanours," but the cases cited as authorities in the note to that article are all cases relating either to the administration of public justice or to defalcations by public officers, and have no resemblance to the present case.

[LORD ALVERSTONE C.J. referred to *Treeve's Case*. (1)]

In *Treeve's Case* (1) it was held that an indictment would lie for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food not fit to be eaten by man. It is true the indictment contains the words "to the great discredit of our Lord the King," but that was an immaterial averment, because, as is stated in East's Pleas of the Crown, at p. 822, "the giving of any person unwholesome victuals unfit for man to eat lucri causa or from malice or deceit is undoubtedly in itself an indictable offence," and therefore the conviction could be justified without having recourse to the doctrine of public mischief. If the facts alleged in this indictment constitute an offence, it follows that any combination which causes mischief or endangers public safety is an indictable offence; but no case has up to the present gone so far as that, and if that is the law there was no necessity for the Foreign Enlistment Act, 1870. In *Reg.* v. *Jameson* (2) it was never suggested, as it might have been if the contention now put forward is correct, that a common law offence had been committed. No principle of law can be stated under which the facts alleged in this indictment can be held to constitute an indictable offence either by an individual or by a combination of persons; the Court is being asked in effect to create a new offence hitherto unknown to the common law. [He referred to Stephen's History of the Criminal Law, vol. iii. p. 358.]

Sir Robert Finlay, A.-G., and *Sir Edward Carson, S.-G.*

(1) (1796) 2 East P. C. 821. (2) [1896] 2 Q. B. 425.

(*H. Sutton*, *C. W. Mathews*, and *Bodkin* with them), for the Crown. It is incorrect to describe this case as an attempt to create a new offence, for although the circumstances may be novel, yet, as was pointed out by Parke B. in his observations on the codification of the criminal law, "the rules of the common law have the incalculable advantage of being capable of application to new combinations of circumstances perpetually occurring" (see Parliamentary Papers for 1854—copies of the Lord Chancellor's letters to the judges and their answers). Apart from the question of conspiracy, the facts alleged in the indictment constitute a common law misdemeanour. It is a well-ascertained principle of the common law that acts involving public mischief are indictable misdemeanours. Numerous examples of the application of this principle are to be found. In *Rex* v. *Higgins* (1) Lawrence J. said: "All offences of a public nature, that is all such acts or attempts as tend to the prejudice of the community, are indictable." In *Rex* v. *Wheatly* (2) Lord Mansfield said: "The offence that is indictable must be such a one as affects the public," and he points out that a conspiracy to cheat is a public wrong. See also *Jefferys* v. *Boosey* (3), per Pollock C.B., quoting the remarks of Willes J. in *Millar* v. *Taylor*. (4) In *Young* v. *Rex* (5) Buller J. said: "To make an offence indictable at common law it must be public in its nature." So in *Rex* v. *Vaughan* (6) it was held that an attempt to bribe a public official was an indictable offence. The facts alleged in the indictment contain all the elements necessary to bring the case within the principle laid down in these authorities. There is the wrongful act, namely, the obtaining of a passport by misrepresentation, the natural consequence of which would be a public mischief, because the peaceful relations existing between this country and Russia would be endangered. It is not necessary that the mischievous consequences should have

(1) (1801) 2 East, 5, at p. 21; 6 R. R. 358.
(2) (1761) 2 Burr. 1125, at p. 1127.
(3) (1854) 4 H. L. C. 815, at p. 936.
(4) (1769) 4 Burr. 2303.
(5) (1789) 3 T. R. 98, at p. 104; 1 R. R. 660.
(6) (1769) 4 Burr. 2494.

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been contemplated; it is sufficient if they are the natural consequences of the wrongful act: *Rex* v. *Dixon.* (1)

[They also referred to 2 East's Pleas of the Crown, p. 821; Blackstone's Commentaries (21st ed.), vol. iv. pp. 161, 162; *Reg.* v. *Closs.* (2)]

The indictment would, therefore, have been good even if it had been against an individual; but in any event it contains all the essentials of a criminal conspiracy, namely, an agreement by two or more persons to do an unlawful act or to do a lawful act by unlawful means: *Mulcahy* v. *Reg.* (3), per Willes J.; *Reg.* v. *Warburton* (4); *Quinn* v. *Leathem* (5); *Reg.* v. *Aspinall* (6); *Rex* v. *De Berenger* (7); *Rex* v. *Mawbey* (8); *Reg.* v. *Parnell* (9); *Reg.* v. *Bunn.* (10)

Sir Robert Reid, K.C., replied.

Cur. adv. vult.

F. O. R.

Aug. 1. Motion, in the same case, for a rule nisi to set aside the verdict and judgment for the Crown, or for a new trial, on the grounds of misdirection and misreception of evidence, and on the ground that there was no sufficient evidence in support of the indictment.

At the trial evidence to prove the following facts was given on behalf of the Crown: That the defendants combined and conspired together to obtain, and they did in fact obtain, from the Foreign Office by false and fraudulent pretences and representations a passport in the name of the defendant McCulloch for his use in Russia with the intent that it should be used in Russia by some other person, and that in fact it was so used with their knowledge and consent. It appeared that the passport some months after it had been issued was found on

(1) (1814) 3 M. & S. 11; 15 R. R. 381.
(2) (1858) 1 Dears. & B. C. C. 460.
(3) (1868) L. R. 3 H. L. 306, at p. 317.
(4) (1870) L. R. 1 C. C. R. 274.
(5) [1901] A. C. 495.
(6) (1876) 2 Q. B. D. 48.
(7) (1814) 3 M. & S. 67; 15 R. R. 415.
(8) (1796) 6 T. R. 619; 3 R. R. 282.
(9) (1880) 14 Cox C. C. 505.
(10) (1872) 12 Cox C. C. 316.

the body of a man who had been killed by the explosion of a bomb in his room at an hotel in St. Petersburgh.

In the course of his summing-up to the jury the Lord Chief Justice directed them as follows: "In this case the alleged conspiracy (I need not go into the details of it) is this: It is said that the two defendants either themselves combined, or combined with some person other than themselves, to obtain from the Foreign Office a passport in the name of one of them which to their knowledge would be used for some other person. . . . I tell you as a matter of law that if you find that the defendants agreed between themselves, or one agreed with the other or with some other person, to commit this act, then the offence in the indictment would be proved. . . . Your duty is to deal with this matter according to what the evidence establishes, and that establishes that Mr. Brailsford got the document signed" (the document here referred to was the application to the Foreign Office for the passport), "and that Mr. McCulloch signed it, both knowing that a passport was to be obtained. A passport is obtained. You have a copy before you, and I need not read it. You would know, even if you had not seen the copy passport, that it is a representation by the highest official of the British Empire—namely, the Foreign Minister—a requisition in the name of His Majesty to all concerned to allow Mr. Arthur Henry Muir McCulloch to pass freely without let or hindrance, and to afford him every assistance and protection of which he may stand in need. . . . That is not a document which anybody, according to the law of England, is entitled to take or use unless he is Mr. Arthur Henry Muir McCulloch. In obtaining that document, if they obtained it with the knowledge that Mr. Arthur Henry Muir McCulloch was not going to use it, I tell you they were obtaining from the public authority a document which would be of public importance and be used by the bearer for the purpose of his national protection, and in getting that and allowing it to be used by other people, if you are satisfied upon the evidence that they did so, they were carrying out acts which were injurious to the public, in that a public officer was asked to issue to one man a document which they

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knew was going to be used by another. . . . You have to take the law from me, and I tell you, if you are satisfied that these gentlemen did conspire to do that which has been described to you by the learned Attorney-General to obtain this passport, that that was a criminal offence."

During the course of the trial the Crown tendered in evidence a statement in writing made by the defendant McCulloch, and given to an inspector of the metropolitan police who was making inquiries about the matter. The defendants' counsel objected to the admission of this evidence on the ground that McCulloch had been induced to make the statement by reason of the inspector telling him that there would be no prosecution.

McCulloch's statement was admitted in evidence.

Sir Robert Reid, K.C. (*J. A. Simon*, with him), in support of the motion. There was no evidence for the jury of any intention on the part of the defendants to cause a public mischief. The intention which in law is necessary to constitute every criminal act is a question of fact for the jury, whether it be an intention to be inferred from the necessary consequences of the defendant's acts or to be inferred from the evidence. No criminal offence was committed here unless the combination of the defendants to obtain a passport in the name of one of them to be used by a third person in Russia was a combination to do an act which tended to produce a public mischief. If that be the rule, the question whether or not the defendants' acts did tend to produce a public mischief was a question for the jury, and it ought to have been left to them to say, as in cases of libel, whether the particular acts came within the rule. There should have been evidence that the acts tended to produce a public mischief; it was not enough to shew that the passport in fact came into the hands of a person who was probably a criminal. The Lord Chief Justice was wrong in directing the jury as matter of law that, if they found that the defendants conspired together to obtain from the Foreign Office a passport in the name of one of them which was to be used, to their knowledge, by a third person, then a criminal

offence had been committed because the acts of the defendants did tend to produce a public mischief.

The statement made by the defendant McCulloch was wrongly admitted in evidence.

LORD ALVERSTONE C.J. We all think there should be no rule; but the matter is so important, and so connected with the motion in arrest of judgment, that we will give our reasons on August 4 next.

W. A.

Aug. 4. The judgment of the Court (Lord Alverstone C.J., Lawrance, and Ridley JJ.) was read by

LORD ALVERSTONE C.J. This was a motion in arrest of judgment upon an indictment against Henry Noel Brailsford and Arthur Henry Muir McCulloch, against whom a jury found a verdict of guilty on the first count of an indictment in respect of a conspiracy to obtain a passport from the Foreign Office in the name of McCulloch to be used by another person.

It is not necessary to repeat at length the allegations in the indictment; its nature may be summarized as follows. It sets out the practice with regard to passports and the conditions upon which they are issued; it alleges a conspiracy between the defendants and other persons not known to obtain by false and fraudulent pretences and misrepresentations a passport in the name of Arthur Henry Muir McCulloch; it alleges the sending in of the necessary documents by Brailsford and McCulloch in the name of McCulloch and the issuing of the passport thereon. It then alleges the use by other persons not known of the passport, and concludes with the following averment: "and the said other persons whose names are unknown in further pursuance of the said conspiracy combination confederacy and agreement did send and cause and procure to be sent the said passport lastly hereinbefore set forth having then thereon the visé and signature of the said Russian Consul-General out of the United Kingdom to a certain person or persons unknown for use when in Russia by a certain person whose name is unknown other than the said Arthur

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Henry Muir McCulloch with the intent and purpose that the said passport should be so used in the dominions of the Czar of Russia by the said person whose name is unknown as aforesaid to the evil example of all others in the like case offending in contempt of our said Lord the King and his laws in fraud of the said regulations issued by and with the authority of the said principal Secretary of State for Foreign Affairs to the injury and prejudice and disturbance of the lawful free and customary intercourse existing between the liege subjects of our said Lord the King and the subjects of the said Czar of Russia to the public mischief of the said liege subjects and the endangerment of the continuance of the peaceful relations between our said Lord the King and the said Czar of Russia and their subjects respectively and against the peace of our said Lord the King his Crown and dignity."

The indictment contained a second count, alleging as an offence the obtaining of a passport by similar false pretences, but without any allegation of conspiracy. The jury, as already stated, found both defendants guilty on the first count, and said that they had not considered the second count, and I discharged them without finding a verdict thereon.

It was argued in arrest of judgment by Sir Robert Reid on behalf of the defendants that the count of the indictment upon which the defendants were found guilty was bad in law as disclosing no indictable offence, and on the ground that the act done—namely, the obtaining of the passport by a false representation—although an improper act was not a criminal act or an indictable misdemeanour at common law, and that the conspiracy to obtain such passport was not an indictable misdemeanour.

We are clearly of opinion that the count is good and that the conviction must stand; but in deference to the arguments of Sir Robert Reid, and as the point has never arisen directly before, we think it right to state the reasons for our decision. It is not necessary for us to decide whether apart from conspiracy the obtaining of a passport by false pretences, namely, by alleging that it was required for the use and protection of A. B., whereas it is in fact intended to be used by some third

person not known or recommended by the Foreign Office, is of itself a misdemeanour; but, as the question has some bearing upon the validity of the conviction on the first count, we desire to make a few observations thereon. It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named.

Passports have been known and recognised as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against the officials of the belligerents, and in time of peace in some countries, as in Russia, they are required to be carried by all travellers.

It is not necessary to do more than to remember certain incidents in the nineteenth century to see what grave international questions might arise in the event of a person holding a passport receiving ill-treatment in a foreign country. It cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognised. The cases cited by the learned Attorney-General—*Rex* v. *Higgins* (1); *Rex* v. *Wheatly* (2); *Young* v. *Rex* (3)—are authorities for this view. They are supported by the reasoning in the judgment in *Rex* v. *De Berenger* (4), *Rex* v. *Dixon* (5), and *Treeve's Case* (6), and a reference to the original record of the decisions of the judges which is in the possession of the Lord Chief Justice shews that *Treeve's Case* (6) did not depend upon the ground given at p. 822 of 2 East, P. C.

(1) 2 East, 5; 6 R. R. 358.
(2) 2 Burr. 1125.
(3) 3 T. R. 98; 1 R. R. 660.
(4) 3 M. & S. 67; 15 R. R. 415.
(5) 3 M. & S. 11; 15 R. R. 381.
(6) 2 East, P. C. 821.

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The whole chapter under the title of "Cheats" in that work is worthy of perusal. It is, however, unnecessary to consider this point further, because we are clearly of opinion that the act done, namely, the obtaining of a passport by a false pretence, is an act of the kind which would render a conspiracy to carry it into effect unlawful, and we think that both defendants have been rightly convicted of criminal conspiracy. Whatever attempts may have been made from time to time to strain the law of conspiracy or to bring within its purview combinations to perform acts to which no objection can be taken when done by a single individual, no question of the kind arises in this case. For a great many years it has been the law of England that conspiracy consists "in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect the very plot is an act in itself and the act of each of the parties . . . . punishable, if for a criminal object, or for the use of criminal means": *Mulcahy* v. *Reg.* (1) This definition is expressly approved by the House of Lords in *Quinn* v. *Leathem*. (2) It cannot be seriously disputed that the obtaining a passport from the Foreign Office by the false statement that it was required for a person named therein and recommended to the Foreign Office, with the intent that it should be used by another and different person who has not been recommended, is a cheat and a conspiracy to deceive the Foreign Office, and obtaining the document by means thereof is a criminal conspiracy. We are, therefore, clearly of opinion that the first count of the indictment upon which the defendants were found guilty is good and the conviction stands.

In addition to the objection taken on motion in arrest of judgment, a motion was made by Sir Robert Reid on Tuesday last for a new trial upon the ground that there was no sufficient evidence in support of the indictment, and that the jury had been misdirected in that it had not been left to them to find that the act done might tend to public mischief. Without saying that there cannot be acts upon which an innocent construction

(1) L. R. 3 H. L. 306, at p. 317. (2) [1901] A. C. 495.

might be put or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. In criminal as well as in civil cases persons are responsible for the natural consequences of their acts. It was not disputed that there was abundant evidence that the defendants did combine to obtain a passport in the name of McCulloch with the intent that it should be used in Russia by some other individual, and that in fact it was so used with their knowledge and consent. We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given. Assuming the matter to relate to the issue of a public document by a public department of State, and it is obtained by a false representation for an improper purpose, i.e., for use by a different person passing himself off as the bonâ fide holder, we are of opinion that it is injurious to the public and tends to bring about a public mischief. It is scarcely necessary to cite authority, but we would call attention to the reasoning of Lord Mansfield in *Rex* v. *Vaughan*. (1) A further point was raised as to the misreception of evidence. We are clearly of opinion that the statement made by Mr. McCulloch was admissible, there being no evidence that the statement was otherwise than free and voluntary, and nothing to bring the case within the rule laid down in *Reg.* v. *Thompson* (2), on which ground the Lord Chief Justice had excluded a letter written by Brailsford to the other defendant. For these reasons the conviction must stand.

Conviction upheld.

Solicitor for prosecution: *Treasury Solicitor.*
Solicitors for defendants: *Radford & Frankland.*

(1) 4 Burr., at p. 2499.

(2) [1893] 2 Q. B. 12.

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[CROWN CASES RESERVED.]

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Oct. 24.

THE KING *v.* VASEY AND LALLY.

Criminal Law—Fisheries—Poisoning Fish in Salmon River—Construction of Statutes—Malicious Injuries to Property Act, 1861 (24 & 25 *Vict.* c. 97), s. 32—*Salmon Fishery Act*, 1873 (36 & 37 *Vict.* c. 71), s. 13.

Although s. 32 of the Malicious Injuries to Property Act, 1861, as amended by s. 13 of the Salmon Fishery Act, 1873, cannot be construed grammatically, the intention of the Legislature is plain, and the section as amended must be construed as making it a misdemeanour punishable with penal servitude for any term not exceeding seven years unlawfully and maliciously to put any lime or other noxious material in any salmon river with intent thereby to destroy the fish.

CASE stated for the opinion of the Court for Crown Cases Reserved by Grantham J.

"(1.) John Thomas Vasey and Joseph Lally were convicted before me at the Midsummer Assizes, 1905, for the county of Durham, upon an indictment under 24 & 25 Vict. c. 97, s. 32, and 36 & 37 Vict. c. 71, s. 13, charging them with having 'On the 18th day of June, 1905, at the parish of Walsingham, in the county of Durham, unlawfully and maliciously put a quantity of lime into Bradley Burn, a tributary of a certain salmon river called the "River Wear" there situate, with intent thereby to destroy the fish then being in the said tributary of the said salmon river.'

"(2.) Judgment was postponed, and the prisoners were discharged upon their own recognizances of bail to appear and receive judgment when called upon.

"(3.) All the facts necessary to support the indictment were proved. But a question was raised as to the effect of the sections under which the indictment was laid.

"(4.) Those sections are in the terms following (24 & 25 Vict. c. 97, s. 32): 'Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of

fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down or otherwise destroy the dam or floodgate of any mill-pond, reservoir, or pool, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years with or without hard labour and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.'

"36 & 37 Vict. c. 71, s. 13: 'The provisions of the 32nd section of the "Malicious Injuries to Property Act," so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words "or in any salmon river" were inserted in the said section in lieu of the words "private rights of fishery" after the words "noxious material in any such pond or water."'

"(5.) The question for the decision of the Court is whether, having regard to the apparent inconsistency of its language, the latter section is effective to extend the provisions of the former section to salmon rivers, for although there is no doubt as to the object of the section, it seems impossible to make the section of the amended Act read grammatically when altered as directed by the amending section."

No counsel appeared for the prisoners.

Mitchell Innes, for the prosecution. It is impossible to take the amending section literally, as the words "private rights of fishery" do not occur in s. 32 of the Malicious Injuries to Property Act, 1861, after the words "noxious material in any such pond or water." The words "private right of fishery," it is true, do occur earlier in the section; bu if the words "or in any salmon river" are substituted for

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those words, the words "or in which there shall be any" are left without any meaning.

[WILLS J. Is not the difficulty met by expanding "any such" in the latter part of s. 32 into their antecedents, and reading them as if they reiterated the description in the earlier part of the section, "any fish-pond, or any water which shall be private property, or in which there shall be any private right of fishery"?]

It is submitted that the simplest course is to construe s. 13 of the Salmon Fishery Act, 1873, as if it did not contain the words "in lieu of the words 'private rights of fishery.'"

The Court will endeavour to give some meaning to the section, and will not allow the error of the draftsman to destroy the clear intention of the Legislature: Maxwell on the Interpretation of Statutes, 3rd ed. p. 319; *Salmon* v. *Duncombe* (1); *Curtis* v. *Stovin* (2); *Stone* v. *Corporation of Yeovil.* (3)

LORD ALVERSTONE C.J. I have no doubt in this case that effect must be given to the principle of construction to which reference has been made on behalf of the prosecution. If the effect of our judgment had been to extend the meaning of the statute, whereas by following the strict words of the enactment its operation would be limited, the case would be different. In Maxwell on the Interpretation of Statutes, 3rd ed. p. 319, the principle of construction is laid down in these terms: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence"; and for that proposition several authorities are cited. In *Salmon* v. *Duncombe* (1) Lord Hobhouse in delivering the judgment of the Privy Council says (4): "It is, however, a very serious matter to hold that when the main object of a statute is clear

(1) (1886) 11 App. Cas. 627.
(2) (1889) 22 Q. B. D. 513.
(3) (1876) 1 C. P. D. 691.
(4) 11 App. Cas. at p. 634.

it shall be reduced to a nullity, by the draftsman's unskilfulness or ignorance of law."

Applying those principles to the present case, we have to see whether the amending section requires modification, on the ground that if it is to be taken literally it will be reduced to a nullity. It seems to me that the object of the section is perfectly plain, and no one can doubt that the intention of the Legislature was to prevent the destruction of fish in salmon rivers by putting lime or other noxious substances into the water. The draftsman must, however, have forgotten exactly how the section of the Malicious Injuries to Property Act, 1861, which deals with the matter runs. I have no doubt that he meant to provide that for the purpose of this Act the expression "salmon river" should be substituted for the description of waters enumerated in the earlier Act. If, therefore, the exact phraseology of the section of the amending Act is disregarded, and the words "or in any salmon river" are inserted in the earlier section after the words "in any such pond or water," that makes sense, and carries out the manifest object of the amendment.

This case is a good instance of the principle that the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language. Whether the amending section be read, as has been suggested, without the words "in lieu of the words 'private rights of fishery,'" or whether, as has been suggested by my brother Wills, the words "any such pond or water" in the latter part of the original section be expanded into their antecedents, and read as if they ran "any fish-pond or any water which shall be private property, or in which there shall be any private right of fishery," and then for those last words the words given by the amending section "or any salmon river" be substituted, seems to me immaterial. The object of the amendment is plain, and I think it is a case in which we must apply the principle I have cited, and so construe the section as to make it carry out that undoubted object.

I think that the conviction must be upheld.

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WILLS J. I am entirely of the same opinion. The difficulty is a purely verbal one, since it is impossible to doubt the object of the amending section. In my opinion we must expand the words "any such" in the earlier section into their antecedents, and then apply the provisions of the amending section. As the earlier section stands, the words "private rights of fishery" do not occur at all in it after the words "noxious material in any such pond or water." It seems to me plain that the draftsman had in his mind how the section would have read if the words "any such" had been expanded. No doubt, even if we construe the two sections in that way, some words will be left to which no meaning can be attached; but they are not words affecting the general purview of the Act, and they may be disregarded. It really is immaterial what words are struck out, so long as words are left which make it an offence to unlawfully and maliciously put lime or any other noxious substance into a salmon river with the intention of destroying the fish. Nobody, I think, who considers the enactments in question as a whole, can doubt that such was the intention of the amending section, and, if so, something must be cast aside in order to make sense of the earlier section as amended. It matters little which words go, so long as the obvious meaning is preserved.

KENNEDY J. I agree.

CHANNELL J. I agree. Qui haeret in litera haeret in cortice.

BUCKNILL J. I agree.

Solicitors for prosecution: *Belfrage & Co., for Halcro & Raine, Sunderland.*

A. P. P. K.

PHŒNIX ASSURANCE COMPANY *v.* SPOONER.

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May 23, 24;
June 3.

Insurance (Fire)—Subrogation—Notice to Treat for Insured Property—Loss by Fire after Notice to Treat—Payment by Insurers to Assured—Renouncement of Assured's Rights in respect of Insured Property—Right of Insurers to recover from Assured the Amount paid.

The defendant insured her buildings against fire with the plaintiff company. During the currency of the policy a corporation gave the defendant a notice to treat for the buildings under the Lands Clauses Consolidation Act, 1845. Before anything had been done under that notice the buildings were destroyed by fire, and the plaintiffs paid to the defendant an agreed sum as the amount of her loss. Subsequently the amount to be paid by the corporation on taking over the property pursuant to their notice to treat was agreed between the defendant and the corporation at a sum arrived at by taking into account the money paid by the plaintiffs to the defendant under the policy, the corporation agreeing to indemnify the defendant against any claim which might be made against her by the plaintiffs:—

Held, that, the contract being one of mere indemnity, the plaintiffs upon payment of the agreed amount of the loss became entitled to all the rights of the defendant in respect of the destroyed property; that those rights included a right to be paid by the corporation the value of the property as it existed at the date of the notice to treat; that the defendant could not by any agreement with the corporation deprive the plaintiffs of that right; and therefore that the plaintiffs were entitled to recover from the defendant the amount paid by them to her in respect of the loss insured against.

COMMERCIAL CAUSE tried before Bigham J.

The plaintiffs' claim was for a sum of 925*l.*, money received, or which might have been received, by the defendant for the use of the plaintiffs. They also claimed the 925*l.* as being the equivalent of the benefit received, or which might have been received, by the defendant from the corporation of Plymouth, or other persons, in respect of a loss by fire against which the defendant was indemnified by the plaintiffs under a policy of insurance effected with them by the defendant, or, further, as the equivalent of a right against the corporation of Plymouth, or other persons, whereby the defendant might have protected herself against or reimbursed herself for the loss, but which right she had renounced or prejudiced to the damage of the plaintiffs.

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The following statement of the facts, which were admitted, is taken from the judgment of Bigham J. (post):—

The defendant, Mrs. Spooner, owned a house and two shops in Plymouth. These premises were insured by her against fire with the plaintiff company. During the currency of the policy the Plymouth Corporation determined to acquire the property, and on August 1, 1900, by virtue of the powers of the Lands Clauses Consolidation Act, 1845, they served on the defendant a notice to treat. Before anything had been done under this notice a fire took place; the buildings were destroyed, and the plaintiffs paid to the defendant 925*l.*, the agreed amount of her loss. After the fire the amount to be paid by the corporation on taking over the property pursuant to their notice to treat was agreed between the defendant and the corporation at a sum arrived at by taking into account the money paid by the plaintiffs to the defendant under the policy, the corporation agreeing to indemnify the defendant against any claim which might be made against her by the plaintiffs.

Cohen, K.C., and *Wood Hill*, for the plaintiffs. The plaintiffs are entitled to recover in this action. The contract of insurance of premises against fire is a contract of indemnity merely, and the insurers are subrogated to all the rights and remedies of the assured against third parties in respect of the property insured; they are also entitled to recover the full value of any rights or remedies which have been renounced by the assured, and to which, but for such renunciation, the insurers would have a right to be subrogated: *West of England Fire Insurance Co.* v. *Isaacs*. (1) The plaintiffs, therefore, having paid to the defendant the agreed amount of the loss, were subrogated to all the rights of the defendant against the Plymouth Corporation to the extent of 925*l.* Her right against the corporation accrued at the date of the notice to treat—*Morgan* v. *Metropolitan Ry. Co.* (2)—and it was to recover from the corporation the value of the property as it stood at that date. She could not renounce or deal with that right to the prejudice of the

(1) [1896] 2 Q. B. 377; [1897] 1 Q. B. 226.
(2) (1868) L. R. 3 C. P. 553.

plaintiffs. The corporation are not entitled to the benefit of the policy.

[They also referred to *Haynes* v. *Haynes* (1); *Penny* v. *Penny* (2); *Rayner* v. *Preston* (3); *Castellain* v. *Preston*. (4)]

Foote, K.C. (*Percival Clarke* with him), for the defendant. This action cannot be maintained. *Rayner* v. *Preston* (3) and *Castellain* v. *Preston* (4) were cases of vendor and purchaser, and do not apply here. The rights of parties under a statutory notice to treat differ from contractual rights. When the notice to treat is given the persons giving it are subrogated to all the rights, in respect of existing contracts, of the person to whom it is given, and the mere fact of the notice being given effects the subrogation. The corporation, therefore, when the defendant's premises were destroyed by fire, became entitled to the benefit of the policy, and the defendant, on being paid the agreed amount of the loss, became a trustee for the corporation of that amount. If the plaintiffs had rebuilt the buildings destroyed by fire instead of paying a sum representing the loss sustained by the defendant, they could have had no claim against the corporation for the cost of rebuilding, and they cannot recover the sum paid to the defendant.

Cohen, K.C., in reply. The decision in *Rayner* v. *Preston* (3) is an answer to the argument for the defendant. In that case it was held that the purchaser of a house, which had been insured against fire before the contract of sale was made and which was burnt down after the contract was made but before completion of the sale, was not entitled as against the vendor to the benefit of the insurance either by way of abatement of purchase-money or reinstatement of premises. A notice to treat stands in this respect on the same footing as a contract of sale.

Cur. adv. vult.

June 3. The following judgment was read by

BIGHAM J. The facts of this case are not in dispute. They are to be found in the pleadings, and, shortly stated, they are

(1) (1861) 30 L. J. (Ch.) 578.
(2) (1868) L. R. 5 Eq. 227.
(3) (1880) 14 Ch. D. 297; (1881) 18 Ch. D. 1.
(4) (1883) 11 Q. B. D. 380.

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as follows: [The learned judge stated the facts as set forth ante.]

The plaintiffs now bring their action against the defendant, alleging that she has, or but for her wrongful act would have, received from the corporation the 925*l.* so taken into account, and that this money is or would have been money received by her to the plaintiffs' use. The action is defended at the cost of the corporation, and in substance the question is whether the corporation are entitled to the benefit of the policy issued to the defendant. It appears to me that they are not. The plaintiffs' contract was a personal contract with the defendant; it never passed either by assignment or by operation of law to the corporation, and it amounted to nothing more than a promise to pay Mrs. Spooner a sufficient sum to indemnify her against any loss she might sustain by reason of her property being damaged by fire. The contract being one of mere indemnity, the plaintiffs, the assurers, upon payment of the loss became entitled to all the rights then vested in Mrs. Spooner in respect of the destroyed property. Those rights, in my opinion, included a right to be paid by the corporation the value of the property as at the date of the notice to treat—that is to say, the value before the fire; and it was not legally possible for her to deprive the plaintiffs of the benefit of this right by any agreement with the corporation. The arrangement made by her with the corporation was, no doubt, made at the instance of the corporation, and was entered into for the purpose of securing to the corporation the benefit of the insurance contract. But the risk of fire was the corporation's risk from the time of the notice to treat, and they must be satisfied to bear it.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Dawes & Sons.*

Solicitors for defendant: *Crowders, Vizard, Oldham & Co., for J. H. Ellis, Town Clerk, Plymouth.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1905
Aug. 9.

CAVALIER AND WIFE *v.* POPE.

Landlord and Tenant—Unfurnished House—Defective Premises—Promise by Landlord to repair—Accident arising from Defect—Personal Injury to Wife of Tenant—Action to recover Damages—Non-liability of Landlord.

The agent of the landlord of a house which had been let unfurnished, in consideration that the tenant would withdraw a threat to quit, promised that the defective condition of the kitchen floor should be repaired. No repairs were done, and some time afterwards the tenant's wife met with an accident which arose from the defective state of the floor. An action was brought by the tenant and his wife against the landlord to recover the expenses to which the tenant had been put and damages for the injury sustained by the wife. At the trial the jury found that the agent, in promising that the floor should be repaired, was acting within the scope of his authority, and they gave a verdict for the plaintiffs, with damages in each case, and judgment was entered accordingly. On appeal by the defendant from the judgment entered in favour of the wife:—

Held, by Collins M.R. and Romer L.J., Mathew L.J. dissenting, that the female plaintiff had no cause of action in respect of the injuries sustained by her.

APPLICATION by the defendant for judgment or for a new trial in an action tried before Phillimore J. with a jury.

The plaintiffs in the action were husband and wife, and the defendant was landlord of a house that had been let by him to the husband unfurnished upon a weekly tenancy and by a verbal agreement. After the plaintiffs had gone to reside in the house they repeatedly called the attention of the defendant's agent to the defective state of the kitchen floor, and finally threatened to quit the premises. The agent thereupon promised that if the male plaintiff would stay on as tenant of the house the necessary repairs should be executed. Some months later, and before any repairs had been done, the female plaintiff met with an accident owing to a chair on which she was standing going through the floor of the kitchen. The claim in the action was for damages for breach of contract resulting in personal injury to the wife and expense to the husband. The jury, in answer to questions put to them by

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the learned judge, found that the agent knew that the floor was defective and promised to repair it, and that in doing so he was acting within the scope of his authority. They returned a verdict for the plaintiffs, and assessed the damages in the case of the wife at 75*l.*, and in the case of the husband at 25*l.* The learned judge entered judgment for the husband for the amount of damages awarded to him, and for the wife for the amount awarded to her on the ground in the latter case that, though the defendant was not liable to her in contract, she could recover against him in tort. The defendant appealed against the judgment entered for the wife, and claimed either a new trial or that the judgment should be set aside and judgment entered for him.

July 28. *Montague Lush*, *K.C.*, and *C. W. Lilley*, for the defendant. There was no contract with the female plaintiff, and, if she has any right of action, her case must fall within one of the classes in which non-feasance gives a right of which advantage can be taken by a stranger—that is, a right based on an invitation by a person having the control of the premises, on a public nuisance, or on the leaving about of a thing that is dangerous in itself. The present case does not fall within any of these classes, and in the absence of a contract the defendant's non-feasance did not create liability. The learned judge seems to have decided in favour of the female plaintiff on the authority of two cases. The earliest of them is *Payne* v. *Rogers* (1); but that does not decide that, if there is a contract by a landlord to repair a house, any one who is injured by the non-repair can recover, for the case was one of a public nuisance. The other case is *Nelson* v. *Liverpool Brewery Co.* (2); but if the dictum of Lopes J. can be taken to cover the case of injury to a stranger where a landlord lets premises in a ruinous condition, it is inconsistent with the decision in *Lane* v. *Cox* (3), to which that learned judge was a party. This later decision is in accord with *Robbins* v. *Jones* (4) and

(1) (1794) 2 H. Bl. 350; 3 R. R. 415.
(2) (1877) 2 C. P. D. 311.
(3) [1897] 1 Q. B. 415.
(4) (1863) 15 C. B. (N.S.) 221; 33 L. J. (C.P.) 1.

Broggi v. *Robins*. (1) It may be admitted that the facts of this case place it on a par with a promise to put the premises in repair on the letting of them; but in such a case the tenant can sue, but not a stranger to the contract, and the female plaintiff is in the position of a stranger. The defendant in this case committed no breach of duty owing to the female plaintiff, and the only difference between the present case and *Earl* v. *Lubbock* (2) is that there the contract to repair related to a chattel. A tenant taking an unfurnished house must himself see that it is in proper condition, as, for instance, that the drains are in order, and the knowledge of the landlord that the drains are out of order does not make him liable for injuries arising from their condition, unless he has made representations that they are in good condition. That in such a case as the present, to create liability, there must be a duty owing from the defendant to the plaintiff is illustrated by the cases of *Caledonian Ry. Co.* v. *Mulholland* (3), *Scholes* v. *Brook* (4), and *Le Lievre* v. *Gould*. (5)

This was not the case of an invitation to use the premises, for such a case rests on the control of the premises which was in the tenant, and there was no trap laid for the female plaintiff, who knew the state of the floor. The third class of cases, in which a person is liable independently of contract on the ground of a duty to the public, does not arise in this case. It is submitted that the female plaintiff had no cause of action, and that judgment should have been entered at the trial for the defendant on her claim.

[The following cases were also referred to: *Pasley* v. *Freeman* (6); *Winterbottom* v. *Wright* (7); *Pretty* v. *Bickmore* (8); *Gwinnell* v. *Eamer* (9); *Hayn* v. *Culliford*. (10)]

A. M. Wilshere, for the plaintiff. There is a right of action in the female plaintiff in tort. She relied on the defendant's promise to repair the floor, and the basis of his liability is the

(1) (1899) 15 Times L. R. 224.
(2) [1905] 1 K. B. 253.
(3) [1898] A. C. 216.
(4) (1891) 63 L. T. 837.
(5) [1893] 1 Q. B. 491.
(6) (1789) 3 T. R. 51; 1 R. R. 634.
(7) (1842) 10 M. & W. 109; 11 L. J. (Ex.) 415; 62 R. R. 534.
(8) (1873) L. R. 8 C. P. 401.
(9) (1875) L. R. 10 C. P. 658.
(10) (1879) 4 C. P. D. 182.

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knowledge that she would use the house, and a consequent duty on his part towards her. In *Heaven* v. *Pender* (1) it is pointed out that the expression "invitation" as used in the reported cases imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and "therefore carries with it the relation between the parties which establishes the duty." The defendant took upon himself the liability to repair. The contract was, no doubt, made with the tenant, but to a stranger the contract does not matter except in so far as it enables him to find out on whom the liability rests. *Todd* v. *Flight* (2) was the case of a successful action against the owner of premises who had let them to a tenant in such a state of unrepair that they had fallen and injured the house of an adjoining owner. In *Lane* v. *Cox* (3) there was no liability on the landlord to repair, which distinguishes it from the present case. In *Miller* v. *Hancock* (4), as in this case, the owner of the premises knew and contemplated that they would be used by persons having business there, and it was held that there was a duty on his part towards such persons to keep a staircase in a reasonably safe condition. *Langridge* v. *Levy* (5) and *George* v. *Skivington* (6) shew a similar duty in the case of the sale of a chattel. *Earl* v. *Lubbock* (7) is not on all-fours with the present case, for there was no evidence of an invitation to use the van. It is suggested that the defendant had no control over the premises; but this is incorrect, for though he was not in occupation, he had or could have obtained sufficient control to carry out his contract. The basis of the plaintiff's case is the existence of a duty to repair the house, so as to get rid of its dangerous condition, and the contract with the tenant is evidence that the obligation was taken upon himself by the defendant.

Montague Lush, K.C., in reply.

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(1) (1883) 11 Q. B. D. 503, at p. 512.
(2) (1860) 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21.
(3) [1897] 1 Q. B. 415.
(4) [1893] 2 Q. B. 177.
(5) (1837) 2 M. & W. 519; 6 L. J. (Ex.) 137; 46 R. R. 689.
(6) (1869) L. R. 5 Ex. 1.
(7) [1905] 1 K. B. 253.

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Aug. 9. COLLINS M.R. read the following judgment:—In this case the defendant let an unfurnished house to the male plaintiff at a monthly rent of 2*l.* 16*s.* 8*d.* The terms were not reduced to writing, and there is no finding that anything was then said about repairs. Some time after the letting, and before the accident hereinafter mentioned, the defendant's agent, as the jury found, agreed with the female plaintiff, acting as agent for her husband, to repair the kitchen floor, which was in a defective condition. The consideration of this promise was the withdrawal by the male plaintiff of a threat to give up the tenancy. Some months later, and before the defendant had done any repairs, the female plaintiff met with an accident owing to a chair on which she was standing going through the floor. The claim as pleaded was by husband and wife for damages for breach of contract. Phillimore J. gave judgment for the husband, apparently on the footing of the contract, for damages sustained by him by reason of the accident to his wife. He held that the wife could not recover as for a breach of contract, but that the defendant was nevertheless liable for damages sustained by her through the defective condition of the floor, which the defendant was under contract to repair. Against this judgment in favour of the wife the defendant appeals. The learned judge, as I have said, was clearly of opinion that the plaintiff was not entitled to maintain the action on the contract made by the defendant with her husband through her agency. No doubt counsel for the respondent did seek to support the judgment in her favour by contesting the learned judge's view on this point, and sought to apply the authorities as to misrepresentation on the sale of chattels of a dangerous character intended for the use of persons not parties to the contract. *Langridge* v. *Levy* (1) and *George* v. *Skivington* (2) were cited. But even assuming that the latter case can be supported, there is, I think, a broad distinction between the rights arising upon the sale of chattels intended for the use of third parties and those which arise out of the failure of a contractor to put premises known to be dilapidated in repair. In this latter case there is neither fraud, misrepresentation,

(1) 2 M. & W. 519; 6 L. J. (Ex.) 137; 46 R. R. 689. (2) L. R. 5 Ex. 1.

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nor warranty, nor the handing over possession of a thing known to be dangerous without warning. There is nothing but remissness in carrying out a contract. The defendant himself was not even aware that such a contract had been made, and there is no evidence that the agent made any misrepresentation or did not intend, if this were material, that what he promised should be performed. I need, therefore, say no more upon this point than that I cordially concur in the learned judge's view; neither is it necessary to consider whether, even if she was entitled to claim the benefit of the contract, the damages which she claimed could be treated as flowing from the breach. It remains to be considered whether her claim can be supported on any other ground. The learned judge has based his decision in her favour on the authority of those cases, of which *Nelson* v. *Liverpool Brewery Co.* (1) is a type, which establish that, where premises are in such a condition as to be dangerous to passers-by and particular damage results to a person so passing, an action lies against the person who is charged with the duty of keeping the premises in repair. These cases rest on the principle that the person who has control of the premises is liable for the consequences of a nuisance, and, though that person is primâ facie to be found in the occupier, he may rebut that presumption by shewing that, in effect, the control has been passed to another person, who has contracted to be responsible for the repairs. Whether the ground on which the liability has been thus cast upon the person responsible for the repairs is, as suggested by Heath J. in *Payne* v. *Rogers* (2), avoidance of circuity of action, or the broader ground that the liability should rest on the person who, in fact, has the control, the liability has never in any decided case that I am aware of been placed on any one who was not deemed to have control. In all these cases there was a duty arising, as Lord Esher M.R. puts it, "from proximity": *Lane* v. *Cox* (3); *Le Lievre* v. *Gould*. (4) They are, in fact, cases of nuisances adjoining places of passage or public highways. Can the analogy of these cases be applied where there is no

(1) 2 C. P. D. 311.
(2) 2 H. Bl. 350; 3 R. R. 415.
(3) [1897] 1 Q. B. 415, at p. 417.
(4) [1893] 1 Q. B. 491, at p. 497.

public nuisance, but merely a defect in the interior of the house, and an injury resulting therefrom to a member of the tenant's family? I think not. To hold otherwise would be to ignore the principle which limits the liability of occupiers towards licensees and guests to what has been described as setting a trap. If the view adopted by Phillimore J. was sound, it would only be necessary for such persons to prove that they had sustained damage from the dangerous condition of the premises, and that the person they sued was liable to repair them. But this is certainly not the law. Therefore, even if the defendant had by the contract of demise taken upon himself the burden of keeping the premises in repair, I cannot see how his liability could be higher than that of an invitor, and inasmuch as the condition of the floor at the time of the accident was probably better known to the plaintiff than to the lessor, including his agent, the "trap" element is quite out of the case. But were his duties as high as those of an invitor? I think *Lane* v. *Cox* (1) is a strong authority that they were not. There the landlord had let an unfurnished house in a dilapidated condition without making any contract to repair. It was held that he was not liable to a workman who sustained personal injuries through the defective condition of the staircase while moving furniture for the tenant at his request. "It has been held," says Lord Esher M.R. (2), "that there is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant there cannot be a duty to a stranger. There was, therefore, no duty on the part of the defendant to the plaintiff, and there could be no liability for negligence." The Court followed the authority of a passage in the judgment in *Robbins* v. *Jones* (3) delivered by Erle C.J., but prepared by Willes J. (4): "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against

(1) [1897] 1 Q. B. 415.
(2) [1897] 1 Q. B. at p. 417.
(3) 15 C. B. (N.S.) 221, at p. 240.
(4) 15 C. B. (N.S.) at p. 223.

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letting a tumble-down house." If no duty was created towards the plaintiff in *Lane* v. *Cox* (1) by the letting of the house in a dilapidated condition, what difference could it have made if he had contracted with the tenant to keep it in repair? What higher rights could this fact have given the plaintiff? I think these considerations suffice to determine this case, but even apart from them I think the plaintiff's case fails. The circumstances here are peculiar. There was no contract for repairs on the creation of the tenancy. It was not made till some time afterwards, and then it was not a contract to keep in repair, but to do certain specific repairs. I think the effect of this contract was not to put the landlord into the control of the premises so as to fix him with liability for a nuisance existing thereon. Suppose the contract to repair had been made by the tenant with an independent tradesman and not with the landlord, and that the tradesman had been remiss in beginning the work and the accident had happened, could he have been made responsible to the plaintiff? I should have thought clearly not. Why is the landlord in any worse position in the circumstances of this case? With all respect, therefore, to the learned judge, I think this appeal must be allowed and judgment entered for the defendant. I do not refer to the Housing of the Working Classes Act, 1890, which was not mentioned in the argument.

ROMER L.J. read the following judgment:—I agree with the judgment just delivered by my Lord, and only desire to add a few words. The plaintiff, Mrs. Cavalier, has no contract with the defendant on which she can sue. Nor does she complain of any breach by the defendant of any public duty on his part. To enable her to succeed, she must establish that her injury was caused by his neglect of some private duty he owed towards her in reference to the dilapidated condition of the flooring in the interior of the house. Now, I take it to be clear that if a person takes as tenant an unfurnished house, he cannot, in the absence (as here) of a warranty or other special circumstances, hold the landlord liable because of damage arising to him

(1) [1897] 1 Q. B. 415.

during and by reason of his occupancy as tenant through the house being out of repair or dilapidated. And if the tenant brings his wife with him to live in the house, she cannot be in a better position than her husband by reason of her occupancy of the house. It follows that in the present case the plaintiffs, during and by reason of their original occupancy of the house, could have had no cause of action against the defendant in respect of any injury arising to them from the house being out of repair or dilapidated. It remains to be considered what difference was made by the landlord coming to an agreement with the plaintiff Mr. Cavalier after the original occupancy that he (the landlord) would repair the premises. It appears to me that that agreement gave to Mr. Cavalier a right to sue for damages for breach of the agreement, but that it did not otherwise alter or affect any duty previously owing to him by the landlord. It could not be successfully contended that by reason of the agreement the landlord is to be taken to have invited the tenant, pending the repairs, or after the expiration of a reasonable time when such repairs ought to have been done under the agreement, to remain in occupancy of the house on the footing that as between them the house was to be taken as repaired. Nor can it be said, in my opinion, that the agreement to repair brought the landlord within that class of case where the owner or occupier of dangerous premises is held liable for inviting an unsuspecting guest or stranger to come upon the premises. And the same observations apply to the wife. The contract with the husband to repair could not create a special private duty on the part of the landlord to the wife which would have had no existence in the absence of that contract. The wife could not be said to remain in occupancy of the house on the footing that as between her and the landlord the repairs were to be taken as effected, or on the footing that she was an unsuspecting person invited by the landlord to come upon or remain in dangerous premises. If any invitation to her can be implied at all, it must be an invitation by her husband which she accepted knowing all the facts. I agree therefore, that the appeal should be allowed, and judgment entered for the defendant as against the wife.

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MATHEW L.J. read the following judgment:—I regret to say that I am unable to agree with the judgments of the Master of the Rolls and Romer L.J. The case is not free from difficulty, but I have come to the conclusion that Mrs. Cavalier is entitled to a remedy at law for the injury she has sustained. For the defendant it was contended that the husband could not recover damages for the injuries occasioned to his wife. It was said that there was no contract which bound the defendant to pay any such damages. The contract with the plaintiff, it was argued, entitled him only to damages for his personal injuries, and his wife could recover nothing because the defendant made no contract with her. My brother Phillimore properly held that the claim of the wife did not arise out of any contract with her, but he gave judgment in her favour on the ground that she must be treated as a stranger injured by the defective condition of the premises, and he dealt with the case as analogous to that of a passer-by in the street injured by the fall of some portion of a ruinous building. I do not think the judgment can be supported on this ground, for the reason given by the Master of the Rolls. But I think there is another principle to which the plaintiff's wife can have recourse. There was no doubt that she was induced to occupy the premises with her husband by a representation which proved to be untrue—namely, that the defendant had resolved that the premises should be properly repaired within a reasonable time. That he never intended to make his representation good is shewn from the fact that before and at the trial the defendant denied that any statement had been made about repairs which was binding upon him. It is true that a considerable time elapsed without complaint on the part of the plaintiffs. But I do not see how the defendant can avail himself of this fact to support his defence. He had greater forbearance and indulgence from his tenants than he could reasonably have expected. He could not say that the plaintiffs had so acted as to lead him to think that they had released him from the fulfilment of the representation which induced them to continue their tenancy. It was said that their remedy was to leave the premises; but, as the landlords of such

property well know, it is not easy for humble people to change their residence. If a husband and wife had been induced to take a dwelling-house upon the representation by the lessor that the premises were, for instance, in good sanitary condition, and it turned out that they were not to the knowledge of the lessor, it would seem that an action would lie on the ground of deceit at the suit of either husband or wife who had suffered from illness in consequence of the misrepresentation. I see no reason for saying that a representation, though prospective, may not be equally deceptive. It is true that the plaintiffs knew of the condition of the premises, but they did not willingly incur the risk to which they were exposed by the conduct of the landlord. With respect to the law of the case, I think there is authority for the position taken on behalf of the wife. *Langridge* v. *Levy* (1) can be supported on the ground that the son for whom the gun was purchased was induced to use it on the faith of the promise to his father that he could do so in safety. It is said that this useful and just decision, as it seems to me, has been doubted, but it has never been overruled. It has been followed in *George* v. *Skivington* (2), and has been referred to without disapproval in many well-known cases—e.g., *Peek* v. *Gurney* (3), *Longmeid* v. *Holliday* (4), *Barry* v. *Croskey* (5), and *Heaven* v. *Pender*. (6)

Appeal allowed.

Solicitor for plaintiffs: *John Davis.*
Solicitor for defendant: *R. Chapman.*

(1) 2 M. & W. 519; 6 L. J. (Ex.) 137; 46 R. R. 689.
(2) L. R. 5 Ex. 1.
(3) (1873) L. R. 6 H. L. 377.
(4) (1851) 6 Ex. 761; 20 L. J. (Ex.) 430.
(5) (1861) 2 J. & H. 1.
(6) 11 Q. B. D. 503.

A. M.

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Dec. 20.
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April 3.

PRINCE *v.* HAWORTH.

Contract—Illegality—Probate Action—Contract by Parties that Costs shall be paid out of the Estate—Infant Co-contractor.

The plaintiff in a probate action sought to establish the validity of a will as residuary legatee, and H., one of the defendants, as an executor and the trustee of an infant beneficiary under a will of the testator earlier in date, sought to establish the validity of that will. During the course of the proceedings in the action a contract was made between the plaintiff of the one part and H. and the infant, who was also a defendant, of the other part, whereby it was agreed that, whichever of the two wills was upheld by the Court, the costs of the plaintiff and of the defendant H. and the infant should be paid out of the estate whether the Court so ordered or not. The Court pronounced in favour of the earlier will, and on application made refused to sanction the contract on behalf of the infant, and directed that the plaintiff should pay the costs of H. and the infant in the probate action.

In an action by the plaintiff to recover his costs against the defendant H. under the contract:—

Held, that the contract was not illegal, and that the defendant was personally liable upon it.

Action tried before Lawrance J., in which the plaintiff claimed to recover 327*l.* 15*s.* 5*d.* from the defendant Thomas Haworth, who was sued as executor of the will of one Thomas Wright, deceased, and personally.

The following statement of the facts proved or admitted at the trial is taken from the judgment of Lawrance J. (post):—

A testator died having left two wills dated respectively on consecutive days, March 3 and 4, 1903. Under the later will the plaintiff claimed as residuary legatee, and under the former the defendant claimed the estate as executor and trustee for an infant as beneficiary. Proceedings were taken in the Probate Division to establish the validity of one or the other of the two wills. In the course of these proceedings the following agreement was made between the plaintiff of the one part and the defendant and the infant (Rebecca Clegg) of the other: "We hereby agree that whether the will dated March 3rd, 1903, or the will dated March the 4th, 1903, is upheld on the trial of this action, that the costs as between a solicitor and his client

of the plaintiff and of the defendants, Thomas Haworth and Rebecca Clegg, shall be paid out of the estate of deceased whether the Court so orders or not. Dated February 20, 1904. William Prince, plaintiff. Thomas Haworth, Rebecca Clegg, defendants. James Clegg, guardian for defendant R. Clegg."

In the probate action the Court pronounced in favour of the earlier will. On an application made, the Court refused to sanction the agreement on behalf of the infant beneficiary, and directed that the plaintiff should pay the costs of the defendant and the infant; and the plaintiff now claims a sum of 327*l.* 15*s.* 5*d.*, his costs as between solicitors and client incurred in and about the proceedings.

J. A. Hamilton, K.C., and *R. V. Bankes*, for the plaintiff.
St. John Leslie, for the defendant.

The arguments and cases cited are, it is thought, sufficiently stated in the judgment.

Cur. adv. vult.

1905. April 3. The following judgment was read by

LAWRANCE J. This case was tried before me as a short cause in December last. The facts are as follows: [The learned judge stated the facts as set forth ante.] The defendant refuses to pay, on the ground that the agreement was and is void as being against the policy of the law in that it tends to affect the administration of justice. In support of this contention the case of *Egerton* v. *Earl Brownlow and Others* (1) was cited, and as instances of the general principle that such agreements are void I was referred to *Staines* v. *Wainwright* (2), a case of fraudulent preference in a composition with creditors, and *Lound* v. *Grimwade* (3), a case of an agreement made to suppress or to colour certain incidents in a criminal prosecution. It appears to me that none of these authorities really touch the present case. If all the parties to this agreement had been sui juris, can anybody doubt that they might have

(1) (1853) 4 H. L. C. 1, at p. 163. (2) (1839) 6 Bing. N. C. 174.
(3) (1888) 39 Ch. D. 605.

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made it? Either party might then have charged or mortgaged his interest, such as it was, in the fund; he might even have conveyed it absolutely either to the party on the other side or to anybody else. There is a broad distinction between an agreement which tends to divert the course of justice and prevent it reaching its proper goal, and an agreement which merely regulates the rights of the parties after the course of justice has reached its proper goal. It is clear that an agreement of the latter kind is not, merely as such, void; if it were, every judgment of a Court of justice would operate as a restraint on alienation of the property recovered. Then is there any special prohibition against a successful claimant to a fund or estate agreeing to pay out of the fund or estate, if and when recovered by him, the costs of the unsuccessful claimant? It is said that Order LXV., r. 14*a*, makes such an agreement invalid. That rule provides that the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of an estate unless the judge otherwise orders. But that is merely a rule of practice, indicating what order shall, under ordinary circumstances, be made in proceedings before the Court: it does not in any way affect the conduct of the parties after the order of the Court has been made. In other words, it is quite consistent with the judge's order directing the costs to be paid by the parties that one party shall agree to pay the other party his costs, and pay them out of what fund he pleases. I come, therefore, to the conclusion that if the parties to this agreement were all of age there would be nothing to prevent them from making this agreement.

The difficulty is caused by the fact that one of the persons who signed the contract is an infant; and it is contended that without her concurrence the other person, i.e., the defendant, cannot in fact perform his promise to pay the plaintiff's costs out of the estate. But when an action is brought against a person for breach of contract to do an act, it is not generally an answer to say that he is unable to do it; the mere inability of the defendant to perform his contract specifically is immaterial to the question of his liability to the plaintiff for non-

performance, except in cases where his promise is conditional upon his ability to perform it. I do not think that the promise of the defendant in the present case was subject to any such condition. Probably the liability of either party was conditional upon one or the other of the two wills being upheld, and, if neither party succeeded in establishing the will under which he claimed, the agreement as to payment of costs would not bind either. But I cannot see that this agreement was subject to any other condition. If the plaintiff had succeeded in establishing the will of March 4, I cannot doubt that he would have been liable under the agreement to pay the defendant's costs, and I can see no reason why the liability of the defendant who has succeeded should be limited by any conditions which are not reciprocal upon both sides. It cannot be suggested that his liability was intended to be conditional upon the infant being jointly liable with him, because as a matter of law he must be taken to have known that the infant was incapable of binding herself by such an agreement as this. A promise by two persons to pay a sum of money is in law a promise that they or one of them will pay it, and one of them may be sued upon it; his only right is to apply by summons to have the other joined as a defendant, which has not been, and could not be, done in this case, as the co-contractor is an infant. It appears, therefore, that the defendant has promised for good consideration that the plaintiff's costs shall be paid out of the fund. He cannot perform this promise. The promise is not conditional upon the happening of any event which has not happened. The result is that, on the authority of *Bradly* v. *Heath* (1), he is liable, and there must be judgment for the plaintiff for the amount claimed.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. C. Jackson, for Steele & Steele, Burnley.*

Solicitors for defendant: *Shaw, Tremellen & Co., for Broughton & Broughton, Accrington.*

(1) (1830) 3 Sim. 543; 30 R. R. 217.

W. A.

C. A.
1905
July 28, 31;
Aug. 11.

[IN THE COURT OF APPEAL.]

In re HAMILTON YOUNG & CO.
Ex parte CARTER.

Bankruptcy—Traders—Bank Loan to purchase Goods—Letter of Lien on Goods — Construction—"Transfer of Goods in the ordinary course of Business"—"Documents used in the ordinary course of Business as Proof of the Possession or Control of Goods"—Secured Creditors—Bill of Sale—Attornment—Reputed Ownership—Order and Disposition—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1890 (53 & 54 *Vict. c.* 53)—*Bills of Sale Act*, 1891 (54 & 55 *Vict. c.* 35)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

Bankers from time to time made advances to traders to enable them to purchase goods for shipment to the East. The course of business was for the traders to send the goods to bleachers to be bleached, and afterwards they were returned to the traders or sent to packers to be packed for shipment; and on the occasion of each advance the traders sent the bank a letter of lien accompanied by the bleachers' receipts for the goods. The letter, which was in printed form, was in these terms: "We beg to advise having drawn a cheque on you for £———, which amount please place to the debit of our loan account, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the under-mentioned goods in the hands of [here followed list of goods and names of bleachers] as per their receipt inclosed. These goods when ready will be shipped to Calcutta, and the bills of lading duly indorsed will be handed to you, and we then undertake to repay the above advance . . . ." On the bankruptcy of the traders:—

Held, by the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.), that the letters of lien were not void as being bills of sale not in the prescribed form and unregistered under the Bills of Sale Acts, but were (Stirling L.J. doubting) "documents used in the ordinary course of business as proof of the possession or control of goods," within the exceptions in s. 4 of the Bills of Sale Act, 1878:

Held, also, that the case was not affected by either of the Bills of Sale Acts, 1890 and 1891.

A few days before the commencement of the bankruptcy the bank gave notice to the bleachers whose receipts they held, claiming all the goods specified in such receipts, and on the same day also gave notice to the traders claiming the goods held by bleachers against which the bank had outstanding advances made to the traders. Bleachers holding for the traders goods not covered by any letters of lien then, at the request of the traders,

attorned to the bank before the commencement of the bankruptcy, except in one case in which the attornment was made subsequently:—

Held, by the Court of Appeal, that none of the goods either specified in the receipts or in respect of which attornment had been made before the commencement of the bankruptcy were, "at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupts" as "the reputed owners thereof" within the meaning of s. 44 of the Bankruptcy Act, 1883; but without prejudice to the question whether the dealings before the bankruptcy with the goods not covered by any letters of lien could be impeached on the ground of fraudulent preference.

Ex parte North Western Bank, In re Slee, (1872) L. R. 15 Eq. 69, and *Merchant Banking Company of London, Ld.* v. *Spotten*, (1877) Ir. Rep. 11 Eq. 586, considered.

Decision of Bigham J., [1905] 2 K. B. 381, affirmed.

Whether the letters of lien were "transfers of goods in the ordinary course of a trade or calling" within the exceptions in s. 4 of the Bills of Sale Act, 1878, *quære*.

APPEAL from the judgment of Bigham J. on a special case stated by the judge of the county court of Lancashire holden at Manchester, sitting in bankruptcy, for the opinion of the High Court, pursuant to s. 97 of the Bankruptcy Act, 1883.

The case is reported below, ante, p. 381, sub nom. *In re Young, Hamilton & Co., Ex parte Carter.*

The debtors were a mercantile firm at Manchester, and consisted of four partners. Two of the partners also traded in co-partnership at Calcutta under the style of Ewing & Co. The course of business between the two firms was as follows: Ewing & Co. in Calcutta from time to time gave the debtors prices which they were willing to pay for any particular goods which they required to be delivered to them c.i.f. in Calcutta. If the debtors saw that they could ship the required goods at a profit on the stated prices, their practice was to accept the offer of Ewing & Co. and to produce the goods by buying the grey cloth, causing it to be bleached and dyed (if dyeing was necessary), and then packed and shipped (carriage paid and insured) to Ewing & Co. at Calcutta. The difference between the price which Ewing & Co. had agreed to pay and the cost to the debtors of production and delivery made up the gain of the debtors. If the prices offered by Ewing & Co. were not high enough their orders were declined, and the debtors asked for better prices. The debtors were not bound to execute any

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orders given by Ewing & Co. For the purpose of obtaining, producing, and shipping as above mentioned, the debtors purchased in Manchester goods and had them prepared, packed, and shipped to Calcutta. The course of preparation of the goods for shipment was that the goods when purchased were sent to be bleached to bleachers, where they remained to the order of the debtors, and such of them as from time to time were required by the debtors for shipment to Ewing & Co. were delivered by the bleachers, in accordance with directions given them from time to time by the debtors, either to the warehouse of the debtors or to packers to be packed.

In order to obtain money with which to pay for the goods which they had purchased, the debtors from time to time used to obtain advances from the National Bank of India, Limited. The debtors had two accounts with the bank—a general account and a loan account—the latter account being called "loan account No. 2," and the course of business with the bank was as follows: The debtors from time to time, as they required to pay for goods purchased in Manchester for shipment, drew cheques on the bank, which were honoured by the bank, and as security for the advances thereby made the debtors used to give the bank a letter of lien which (omitting formal parts) was in the following terms:—

"We beg to advise having drawn a cheque on you for £———, which amount please place to the debit of our loan account No. 2, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the undermentioned goods in the hands of [here followed list of goods and names of bleachers] as per their receipt inclosed. These goods when ready will be shipped to Calcutta, and the bills of lading duly indorsed will be handed to you, and we then undertake to repay the above advance either in cash or from the proceeds of our drafts on Messrs. Ewing & Co., Calcutta, to be negotiated by you and secured by the shipping documents representing the above-mentioned goods. But in no case is the advance to extend beyond two months from date hereof, unless by special arrangement, at the expiry of which

we undertake to repay the same or any portion thereof then outstanding. Interest on this advance to be at the rate of 6 per cent. per annum. We undertake that the goods while in course of preparation for shipment shall be covered against fire risk under a general policy of assurance which we shall deposit with you."

Accompanying the letter of lien, the debtors gave to the bank the receipts of the bleachers for the goods specified in the letter. As soon as the debtors had in their hands ready for shipment to the East goods of a value at least equal to the amount of one of the cheques thus drawn upon and honoured by the bank, they invoiced and shipped the goods to Ewing & Co. in Calcutta, and handed to the bank a copy of the invoice and the bill of lading of the goods so shipped, together with a letter signed by them (called the shipment letter) and a trust receipt to be signed by Ewing & Co. in Calcutta, and also a letter of written instructions to the bank as to the disposal of the moneys representing the value of such goods. The shipment letter was addressed by the debtors to the bank and (omitting formal parts) was as follows:—

"Having this day received from you an advance of £———, bearing interest at 6 per cent. per annum, we hereby hand you as collateral security for the due repayment of such advance and interest, bills of lading, invoices, and policies of insurance for ——— packages per ——— to Calcutta, as described at the foot hereof, which documents are to be handed to your Calcutta agency.

"Our agreement is as follows:—

"Firstly, that on arrival of the documents in Calcutta they will be handed to Messrs Ewing & Co. by your agents, who will receive in exchange a formal lien over them and the goods they represent, and an undertaking to provide for fire insurance.

"Secondly, that within six months after the date of the above advance Messrs. Ewing & Co. will release the above documents referred to by delivering to your said agent a telegraphic transfer or demand draft on London for the equivalent amount of the said advance, together with interest

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at 6 per cent. per annum from date hereof, until approximate due date of arrival in London of such remittance. Your bank to have the preference at equal rates." Then followed the particulars of the documents referred to.

The effect of each transaction above described was intended by the parties to be a payment in reduction of the outstanding amounts secured by goods hypothecated to the bank. When goods had been shipped of a value sufficient to cover or partly cover the amount outstanding under a particular letter or particular letters of lien, the amount mentioned in the shipping letters and documents was allocated to such particular letter or letters of lien either as a payment in full or in part of the amounts due under such letter or letters of lien, as the case might be. In cases where the amount was allocated as part payment of the amount due under a letter of lien, it was the course of business that goods sufficient to secure both the undischarged balance and also the aggregate amount of all other letters of lien remained in the hands of the bleachers, or packers, or shippers, or in the warehouses of the debtors under lien to the bank.

The goods shipped were on arrival delivered into a special godown rented by the bank, whose name appeared thereon and the keys whereof belonged to the bank and were in their possession. All such goods had been sold in Calcutta before arrival, and, under a verbal arrangement with Ewing & Co. in Calcutta, the bank allowed that firm to deliver such goods as the bank's agents to the purchaser, Ewing & Co. paying into the bank on the day after delivery the amount of the invoice value of such goods. The bank, after receipt of the letters of lien, had no information as to the movements of the goods between the bleachers, or the dyers, or the packers, and the debtors, nor as to whether the goods specified in the invoice and shipment letter and bill of lading corresponded wholly or partly with the goods specified in any letter of lien. All that the bank required was that the goods specified in the bill of lading, invoice, and shipment letters should be of a value sufficient to secure the bank in respect of the amount mentioned in the shipment letter. There was nothing in the

shipping documents enabling the bank to identify the goods therein mentioned and the goods mentioned in the bleachers' receipts which accompanied the letters of lien.

In June and early in July, 1903, the debtors had given the bank letters of lien on goods belonging to them which had been placed with bleachers and dyers as security for advances made to them by the bank amounting to upwards of 5000*l.*, and the bleachers' receipts had been sent with the letters of lien to the bank; and on July 13 there were goods to a large amount in the hands of the bleachers and dyers.

On the same date other goods, which had been purchased by the debtors, were lying, partly in the warehouses of the debtors, having been redelivered to them by the bleachers, and partly in the hands of packers, having been delivered to the debtors by the bleachers and subsequently sent by the debtors to the packers to be packed.

On July 14, 1903, the bank, having been informed by telegram from Calcutta that the debtors' firm there of Ewing & Co. were in difficulties, wrote to the several bleachers whose receipts were held by the bank requesting them to hold the goods specified in those receipts to their (the bank's) order, pending instructions as to their disposal. On the same day the bank wrote to the debtors claiming the goods held by the bleachers, packers, and others against which the bank had outstanding advances to the debtors, and informing the debtors that they, the bank, were writing to the bleachers to the effect above mentioned; also requesting the debtors to write to the bleachers confirming the bank's action.

The bank did not know at the time they so wrote to the bleachers whether the goods specified in each letter were in the hands of the bleachers to whom the letter was addressed, or what part of them had been already delivered by those bleachers to the debtors, or to packers, dyers, or shippers.

Prior to July 14, 1903, the bank had not given to the bleachers any notice or intimation with regard to the letters of lien, or with regard to the bank holding security over the goods in the bleachers' hands, or that the bank held the bleachers' receipts.

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In pursuance of the bank's request of July 14, 1903, the debtors, on July 20, 1903, wrote to all the bleachers, dyers, and packers who held goods to the order of the debtors (including the bleachers to whom the bank, as holding their receipts, had given notice on July 14) requesting them to write to the bank acknowledging that they held the goods to the bank's order, subject to any prior lien they, the holders of the goods, had for charges incurred; and on July 21, 1903, the debtors wrote to the bank informing them that they had made that request.

On July 24, 1903, the debtors committed an act of bankruptcy by sending out a circular to their creditors announcing, in effect, their insolvency, and on August 15, 1903, they were adjudicated bankrupt.

Pursuant to the debtors' request in their letter of July 20, 1903, the several bleachers, &c., sent letters of acknowledgment to the bank. All these letters were dated before July 24, except one, which was dated subsequently, and was sent by a firm of bleachers whose receipt for goods was not one of those held by the bank, but remained in the hands of the debtors.

The questions submitted to the Court by the special case were these:—

1. Whether such of the goods described in the letters of lien as on July 24, 1903 (the date of the commencement of the bankruptcy), were in the hands of the bleachers were at that date subject to any lien or charge in favour of the bank, or whether the bank was entitled to such goods.

2. Whether the bank on the said July 24, 1903, was entitled to any charge or lien on, or was entitled to, any of the goods mentioned in the letters of lien which on the said date were not in the hands of the bleachers, but could be traced as being then in the hands of Hamilton Young & Co. at their warehouses, or were at the dyers, packers, or the docks.

3. Whether the bank was on the said date entitled to any charge or lien on, or entitled to, any other of the goods which on the said date or later were in the hands of the bleachers, or of Hamilton Young & Co., or at the packers, dyers, or the docks, and which were now claimed by the bank.

The questions of law argued before Bigham J. were—(1.) whether the letters of lien were "bills of sale," and therefore required registration under s. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) (1); and (2.) whether the goods were, on July 24, 1903, the date of the commencement of the bankruptcy, "in the possession, order, or disposition of the bankrupts, by the consent and permission of the true owners" (the bank), within s. 44 of the Bankruptcy Act, 1883.

Bigham J. held (2) on those two questions of law (1.) that the letters of lien fell within the exceptions in s. 4 of the Bills of Sale Act, 1878, and therefore did not require registration; and (2.) that, in the circumstances, the goods were not in the possession, order, or disposition of the bankrupts with the consent of the bank. Accordingly the learned judge answered the three questions submitted by the special case in favour of the bank.

The trustee appealed.

The appeal was heard on July 28 and 31, 1905.

Danckwerts, *K.C.*, and *E. W. Hansell*, for the trustee. First, these letters of lien are "bills of sale" within s. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and are therefore void as not being in the statutory form, and also as not having been registered. Bigham J. held that they came

(1) The Bills of Sale Act, 1878, s. 4, enacts that "the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, ... transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented."

(2) Ante, p. 381.

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within the exceptions mentioned in the section, namely, that they were "transfers of goods in the ordinary course of business of a trade or calling," and also "documents used in the ordinary course of business as proof of the possession or control of goods." But that finding of the learned judge was not supported by evidence; for there was no evidence whatever that the practice adopted by this firm in dealing with these documents was one adopted "in the ordinary course of business" among commercial men. On the contrary, the trustee has filed an affidavit shewing that no such practice prevails in commerce.

[*Schiller*, for the bank, objected to the affidavit being read. It was not used in the Court below, and there had been no cross-examination upon it.

VAUGHAN WILLIAMS L.J. We cannot admit that affidavit now.]

Again, the learned judge was wrong in holding that the bleachers well knew that their receipts were used by the firm as they were in this case: there is no evidence that they had any such knowledge. The learned judge was also wrong in not making a distinction between goods ordered before July 24, 1903, the date of the commencement of the bankruptcy, and goods ordered after that date.

But, returning to a consideration of the exceptions in s. 4 of the Bills of Sale Act, 1878, a letter of lien like that under consideration is not a "transfer of goods" at all, for it says "*We hold* on your account and under lien to you" the goods mentioned; it is no "transfer," nor does it shew any possession in the bank. In fact, the bank is not entitled to possession at all. The whole intention was that the firm should continue in the possession and control of the goods, but that the bank should have an equitable charge upon them.

[VAUGHAN WILLIAMS L.J. A sort of floating security.]

Exactly. There was no appropriation of any particular goods to meet any particular advance: all that the parties intended was that, when any particular goods came forward for shipment, there should be enough to secure the advance. Upon the whole transaction, what the bank had was a floating

security in equity over the whole of the goods; and they had no right to take possession of any particular portion. It is submitted, therefore, that these documents do not come within the exceptions in s. 4 of the Act at all, and that they fall within the definition in that section of a "bill of sale." That being so, the bank cannot retain them against the title of the trustee in bankruptcy: *Newlove* v. *Shrewsbury* (1); *Furber* v. *Cobb*. (2) These documents are really hypothecation notes, which have been held to be "bills of sale": *Reg.* v. *Townshend* (3); *Edwards* v. *Edwards*. (4) *Ex parte North Western Bank, In re Slee* (5), where it was held that a transaction of advance and hypothecation did not amount to a bill of sale, does not apply here, for that was a case under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), in which the definition of a "bill of sale" is not so comprehensive as that in s. 4 of the Act of 1878.

Some restriction should be placed upon the words "in the ordinary course of business." For instance, they do not point to the borrowing of money on mortgage or special agreement: *Tennant* v. *Howatson*. (6) That applies to this case, which is one of loan with a security. It follows that these letters of lien are not "documents used in the ordinary course of business."

Secondly, these goods were, at the date of the commencement of the bankruptcy, "in the possession, order, or disposition of the bankrupts with the consent of the true owners," the bank, within s. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), for no property in them passed from the firm. They were the "reputed owners," and there is nothing shewing that this reputed ownership had terminated before the bankruptcy. *In re Watson & Co.* (7), which was relied on below, and in which *Sharman* v. *Mason* (8) was explained, shews that the question whether goods are "in the possession, order, or disposition of

(1) (1888) 21 Q. B. D. 41, 45.
(2) (1887) 18 Q. B. D. 494, 507.
(3) (1884) 15 Cox C. C. 466.
(4) (1876) 2 Ch. D. 291, 297.
(5) L. R. 15 Eq. 69.
(6) (1888) 13 App. Cas. 489, 494.
(7) [1904] 2 K. B. 753.
(8) [1899] 2 Q. B. 679.

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the bankrupt" depends on the real circumstances of the case—whether they necessarily lead to the inference of ownership by the bankrupt. The circumstances of the present case warrant that inference.

J. A. Hamilton, K.C., and *Schiller*, for the bank. The transaction was an ordinary mode of business adopted by commercial men in such cases, and the letter of lien was "a transfer of goods in the ordinary course of business" within the exceptions in s. 4 of the Act of 1878. The words "We hold on your account" in the letter of lien or document of charge operate, as Bigham J. has held, as a good delivery or "transfer" of the goods to the bank: *Wm. Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1), where the House of Lords reversed the decision of the Court of Appeal. (2) *Tennant* v. *Howatson* (3) was a case with reference to the practice prevailing among grain-growers in Trinidad, the question being, what was a bill of sale under a Trinidad Ordinance. It is not a case capable of general application. As to *Furber* v. *Cobb* (4), the document in that case was admittedly a bill of sale, the only question being whether it was vitiated by not following the statutory form, and by containing certain special provisions. It was held to be invalid on the ground that it had been "drawn in a manner calculated to embarrass the reader and with a highly perverse ingenuity." The case was one totally different from the present. *Ex parte North Western Bank, In re Slee* (5), was a decision on the meaning of the exceptions of transfers or documents used "in the ordinary course of business" in s. 7 of the Act of 1854; but as the list of exceptions in that Act is identical with that in the Act of 1878, it is really a decision in point here. It is also referred to with approval in *Ex parte Conning, In re Steele.* (6) In *Reg.* v. *Townshend* (7) the question was, not whether the transaction was one "in the ordinary course of business," but whether it came within the exception of "goods at sea" in the Bills of Sale Acts, 1878 and 1882.

(1) [1905] A. C. 454.
(2) [1904] 1 K. B. 387.
(3) 13 App. Cas. 489.
(4) 18 Q. B. D. 494.
(5) L. R. 15 Eq. 69.
(6) (1873) L. R. 16 Eq. 414.
(7) 15 Cox C. C. 466.

This case is really covered by *Merchant Banking Company of London, Ld.* v. *Spotten.* (1) The intention of the parties was that when the bills of lading reached the bank it should have complete protection, but till then partial protection only. The transaction should be treated as a whole, and is one "in the ordinary course of business," and therefore within the exceptions. Then, as to the point that the goods were in the order and disposition of the bankrupts at the commencement of the bankruptcy.

[VAUGHAN WILLIAMS L.J. We need not trouble you on that point.]

Hansell, in reply. It is submitted that, even if the argument of the bank is well founded, the answer given by Bigham J. to the third question must be wrong. The effect of that answer is to declare the trustee entitled to goods which were not comprised in either of the letters of lien, or in the receipts attached thereto. The notices given by the bank to the bleachers, if they were not given in pursuance of an antecedent contract, cannot give the bank any title to the goods, for it could be impeached on the ground of fraudulent preference. It seems to have been assumed in the Court below that all the goods in the hands of the bleachers were covered by some of the letters of lien, but that was not the fact. The notices were given only to perfect an existing security, not to create a new one. It is contended that the letters of lien do not come within any of the exceptions mentioned in s. 4. The letters did not give the bank a right to take possession of the goods, nor had the bank any "control" of the goods—that is, a power of disposition over them. The bank could not have prevented the goods being sent out undyed, nor could they have insisted that the goods should be sent to a specified dyer. The letters were not documents "used in the ordinary course of business."

Cur. adv. vult.

Aug. 11. VAUGHAN WILLIAMS L.J., after stating the facts from the special case, and the practice, as there detailed,

(1) Ir. Rep. 11 Eq. 586.

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adopted by Hamilton Young & Co. and the bank with respect to the letters of lien, and the advances on the security thereof, continued :—The result of the practice detailed seems to be that, in respect of the matter and preparation and shipment of the goods, the management and direction of these goods, for the purposes of bleaching, dyeing, and shipping, until the bills of lading were handed over, rested entirely with Hamilton Young & Co., and that no property, other than by way of lien or charge, would pass to the bank until the bills of lading were handed over, but that the bank had in equity a right to an injunction restraining Hamilton Young & Co. from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank. The bank had also such rights as the possession of the bleachers' receipts might give them, but there is nothing in the special case to shew that the bleachers would have given up the goods to the bank on the production of the receipts. On July 24, 1903, just before the failure of Hamilton Young & Co., the goods to which the National Bank now asserts a claim may, as I understand the case, be divided into three categories : (1.) goods, the subject of letters of lien, which were then lying at the bleachers or in the warehouse of Hamilton Young & Co. ; (2.) goods, the subject of letters of lien, which were not in the hands of the bleachers, but which can be traced as being then in the hands of Hamilton Young & Co. at their warehouse, or at the dyers or packers, or at the docks ; and (3.) goods, not the subject of any letters of lien, which on July 24 were in the hands of the bleachers or of Hamilton Young & Co., or at the packers or at the docks, and which are claimed by the bank. [The Lord Justice then referred to the letters of July 14, 1903, written by the bank to the bleachers and to Hamilton Young & Co., the confirmatory letter of July 20, 1903, written by Hamilton Young & Co. to the several bleachers, dyers, and packers, and the letter of July 21, 1903, written by Hamilton Young & Co. to the bank ; and after stating the questions submitted by the special case, proceeded :—] In my judgment, all the three questions should be answered in favour of the bank. I am of opinion that such of the goods described in the letters of lien

as were, on July 24, 1903, in the hands of the bleachers, were subject to a lien or charge in favour of the bank. In the same way I think that the bank was entitled to a lien or charge on such of the goods mentioned in the letters of lien as on that date could be traced as being in the hands of Hamilton Young & Co. at their warehouses, or were at the dyers, packers, or at the docks.

I think that questions 1 and 2 should be answered in favour of the bank, for, in my opinion, the letters of lien, with the accompanying receipts, are not bills of sale, because they come within the exception from s. 4 of the Act of 1878, being documents "used in the ordinary course of business as proof of the possession or control of goods."

That such documents as the letters of lien, with the accompanying receipts of the persons in actual possession, are documents used in the ordinary course of business I have no doubt; but the question is whether such documents "are used as proof of the possession or control of goods" within the meaning of the exception. I think, however, that these documents were, in the ordinary course of business, used as proof of possession or control of these goods. The documents are records of a bargain creating a lien or charge in favour of the bank, and declaring that Hamilton Young & Co. hold the goods specified in the respective letters on account of the bank and under lien in the hands of the persons therein named, and as such would be bills of sale but for the fact that they fall within the exception. But I think they do fall within the exception, and I think that the documents are not the less intended as proof of control within the meaning of the exception because the goods, while thus held by Hamilton Young & Co., or their bailees, the bleachers, packers, and others, were to be dealt with by Hamilton Young & Co. at their discretion in preparation for shipment to the East. The control of the bank, in my opinion, continued all along. The bank would, on the strength of these documents, at any time have been entitled to an injunction restraining Hamilton Young & Co., if they had attempted to take the goods out of the control of the bank by dealing with them for a purpose other than that of preparation

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for shipment, and shipment to the East. I do not think it makes any difference on this point whether the goods happened to be held by Hamilton Young & Co. on account of the bank and under lien to the bank in the warehouse of Hamilton Young & Co., or in the hands of the bleachers and others who had given receipts to Hamilton Young & Co.

Then comes the third question, whether the bank, on July 24, 1903, were entitled to any other goods which at the said date were in the hands of bleachers or packers, or of Messrs. Hamilton Young & Co.—that is, goods other than those mentioned in the letters of lien with receipts attached. I think that, except in one case, the bank is entitled to these goods, because the title of the bank does not arise under a document void as a bill of sale, and the bleachers to whom notice was sent, in all cases except one, attorned to the bank before the act of bankruptcy.

Our attention has been called by Stirling L.J. to the Bills of Sale Acts, 1890 and 1891. Our attention was not called to those statutes during the argument; but, having regard to their provisions, I wish to make a few further observations. In s. 4 of the Act of 1878, after the definition of a "bill of sale," there are certain exceptions—exceptions which, I may observe, equally existed in the prior Bills of Sale Act, 1854, and among those exceptions are, "Transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea." Now, without going in detail into the very few short provisions in those two statutes of 1890 and 1891, it may be said generally that the intention and effect of those two statutes were to extend to an instrument dealing with imported goods "prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser not being the person giving or executing such instrument," the exception which already existed in the Act of 1878 of "bills of sale of goods in foreign parts or at sea." Now, in the Act of 1854 there were no provisions such as exist in s. 4 of the Act of 1878, which, to put it shortly, included in bills of sale documents in respect of which an equitable charge had been given.

Under the Act of 1854 there was decided the case of *Ex parte North Western Bank, In re Slee* (1), in which it was held that a letter of hypothecation by which a factor and warehouse-keeper pledged certain wools in his possession to his bankers to secure an advance, constituted a good equitable charge which did not require registration, the advance and charge having been made in the ordinary course of business. Now that decision was really based upon the ground that the documents there in question did not fall within the definition of a "bill of sale" at the commencement of the section. Then followed the alteration in the Act of 1878, and s. 4 of that Act repeated the exceptions contained in the Act of 1854.

Under these circumstances, the real question in this case is, What was the effect of the extension by the Act of 1878 of the definition of a "bill of sale" so as to make it cover an equitable charge? Now, in my judgment, one thing at all events is perfectly plain—that, whatever might be the effect of the extension of the definition, the exception applied as much to the extended definition as it did to the original definition existing in the Act of 1854.

The case of *Ex parte North Western Bank, In re Slee* (1), was dealt with in an Irish case—*Merchant Banking Company of London, Ld.* v. *Spotten* (2) in 1877—that is, also before the Act of 1878; but if the judgments in those two cases and the expressions of the judges are carefully considered, it is plain that, although the documents in question were held not to be bills of sale because they did not fall within the then existing definition, yet the Court in both cases thought that the scope of the Act of 1854 was not to avoid, as bills of sale, documents used in the ordinary course of business by merchants for the purpose of proof of possession or control of goods.

Under those circumstances we have to consider here whether these documents were intended to be proof of possession and control of the goods in question. Now Bigham J. has arrived at the conclusion, as appears from his judgment, that the documents described in the letters of lien were intended both as proof of possession and also as proof of control. I am not

(1) L. R. 15 Eq. 69. (2) Ir. Rep. 11 Eq. 586.

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saying that that is not so, but I prefer to take the simpler case of whether they are used as proof of the possession of the goods. I have no doubt, myself, that business people in Manchester would all so regard them; but still that will not do unless, according to a proper construction of the words, these documents were, having regard to the surrounding circumstances, intended as "proof of possession or control" within the meaning of the exception in s. 4 of the Act of 1878.

Now, for one moment I will deal with the case apart from the statements in the special case describing the practice of the bank and of Hamilton Young & Co. with reference to the preparation of the goods by dyeing, bleaching, and to otherwise preparing those goods for shipment; and, taking the case apart from that practice, I am of opinion that these documents were intended as proof of possession or control.

Then, does it make any difference that the bank allowed Hamilton Young & Co. to exercise their discretion as to those steps which necessarily had to be taken before the goods could be made ripe for realization by them—goods, it must be remembered, which by the very terms of the letters of lien remained, from the moment of the giving of those letters, goods subject to a good lien on the part of the bank? In my judgment, the fact that the bank had their lien and had those goods held for them by Hamilton Young & Co. does not prevent the giving of the letters of lien, coupled with the receipts, being, according to the ordinary practice of bankers, proof of possession or control by Hamilton Young & Co. of those goods.

Then, with regard to the two statutes to which I have referred, which were not brought to our attention in the course of the argument, I see no reason why they should be considered as in any way interfering with the conclusion at which I have already arrived; and, as I agree with Bigham J. in his view as to the question of order and disposition, I think this appeal should be dismissed with costs.

STIRLING L.J. On the first two questions raised by the special case, which relate to goods comprised in letters of lien,

I think it right to state that I doubt whether the letters of lien are either "transfers of goods in the ordinary course of business of a trade or calling" or "documents used in the ordinary course of business as proof of the possession or control of goods" within the meaning of s. 4 of the Bills of Sale Act, 1878. That doubt is independent of the two statutes of 1890 and 1891, though it is not lessened by the terms of those statutes. Nevertheless, as my brethren agree in the view taken by Bigham J., to whose opinion on mercantile documents of such a character as this case deals with I attach very great weight, I think I ought not to differ from them.

I should add that my doubt does not extend to the third question. I think that the attornment, before the commencement of the bankruptcy, of the bleachers and other persons with regard to the goods to which that question relates, created a change in the legal possession of the goods which cannot be referred to any document open to the objection of being invalid as a bill of sale, for the simple reason that there is no letter of lien which refers to any of those goods. I also think that, even if there had been a letter of lien relating to these goods in the same terms as the letters which relate to the other goods, I should have had difficulty in coming to the conclusion that the dealing just before the commencement of the bankruptcy was a performance of or to be referred to an agreement contained in such letter. However, there is in fact no such letter, and the question does not arise. Whether the latter transaction is bad as a fraudulent preference is, I think, a question not open to us to consider, because no such question is raised by the special case.

COZENS-HARDY L.J. I agree that this appeal must be dismissed, and for the reasons assigned by Vaughan Williams L.J. The general policy of the Bills of Sale Act, 1878, was not to interfere with ordinary business transactions. In so far as they might be hit by the general words in the definition of "bill of sale," they are taken out by the express exception. I think the letter of lien, coupled with the deposit of the bleachers' receipt, was a "document used in the ordinary course of business as

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proof of the control of goods" within the meaning of s. 4 of the Act of 1878. It enabled the bank to prevent the bankrupts, by injunction, from dealing with the goods in any manner inconsistent with the arrangement contemplated by the parties—an arrangement which would result in the handing over of bills of lading when the goods were ready for shipment to Calcutta. It thus gave the bank a "control" of the goods. This disposes of the first and second questions.

As to the third question, I think the attornment of the bleachers gets rid of all difficulty. Mr. Hansell sought to argue that the title of the bank could be impeached on the ground of fraudulent preference. But no such question can arise on this special case; and nothing decided by us on this appeal will in any way preclude the raising of the issue of fraudulent preference in proceedings properly directed to that issue.

Appeal dismissed.

Solicitors: *Chester & Co., for Bullock, Worthington & Co., Manchester; Sanderson & Co.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

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Aug. 7.

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Ship—Charterparty—Arbitration Clause—Cesser Clause—Bill of Lading—Incorporation of Terms of Charterparty—Claim for Demurrage at Port of Loading—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

It was provided by clause 39 of a charterparty, by which the plaintiffs' vessel was chartered by the defendants for the carriage of a cargo of wheat from Bahia Blanca to a port in the United Kingdom, that, if the loading of the cargo were delayed by reason of certain causes therein specified, the time so lost should not be counted as part of the lay-days, and that, if any dispute arose under that clause in the loading of the ship, the same should be settled in the Argentine Republic by arbitration in the manner therein mentioned. The charterparty contained the usual cesser clause providing that the charterers' liability should cease upon shipment of the cargo, provided the cargo was worth the bill of lading freight, dead freight, and demurrage at the port of shipment, and that the vessel should have a lien on the cargo for recovery of all such bill of lading freight, dead freight, demurrage, and all other charges whatsoever. A full cargo was shipped by the defendants under the charterparty, and bills of lading were given in respect thereof, by which the cargo was made deliverable to the defendants or their assigns, they paying freight for the said goods, against delivery, in cash, at a rate of freight in accordance with the charterparty. The bills of lading stated that all the terms and exceptions contained in the charterparty were therewith incorporated, and formed part thereof, and gave the shipowners an absolute lien on the cargo for the recovery of freight and demurrage and all other charges whatsoever. There was no dead freight, and the cargo shipped was worth the freight and charges. A dispute within the meaning of clause 39 having arisen with regard to delay in the loading of the ship between the plaintiffs and the defendants after the completion of the loading:—

Held, that, notwithstanding the cesser clause, and the fact that the defendants were the holders of the bills of lading, the provision for arbitration in clause 39 of the charterparty remained operative as between the plaintiffs and the defendants, and therefore that an action brought by the plaintiffs after the ship's arrival in the United Kingdom, claiming a declaration that they were entitled to a lien on the cargo for demurrage at the port of loading, should be stayed under s. 4 of the Arbitration Act, 1889.

Runciman & Co. v. *Smyth & Co.*, (1904) 20 Times L. R. 625, overruled.

APPEAL by the defendants from the refusal of Channell J. to stay the action under s. 4 of the Arbitration Act, 1889.

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The action was brought by shipowners in the Commercial Court for a declaration that the plaintiffs were entitled to a lien on certain goods discharged from a steamship called the *Woodbridge*, belonging to them, for the sum of 661*l.*, and for payment of that sum, which had been deposited in a bank in joint names to abide the result of proceedings.

On January 7, 1905, a charterparty was entered into at Buenos Ayres between the plaintiffs and one F. M. Nicholson, who was acting as agent for the defendants, whereby the *Woodbridge* was chartered to Nicholson to carry a cargo of wheat from Bahia Blanca to a port in the United Kingdom. By clause 23 of the charterparty the cargo was to be loaded by the charterers at the rate of 200 tons per running day (Sundays and holidays excepted), and time for loading was to commence to count twelve hours after written notice had been given by the master, brokers, or agents to the charterers or their agents that the vessel was in readiness to receive cargo, and all time on demurrage over and above the said laying days was to be paid for by the charterers or their agents to the ship at the rate of 4*d.* per gross register ton per day. By clause 31 it was provided that the master should sign bills of lading as presented at any rate of freight that the charterers or their agents might require, but any difference in amount between the bill of lading freight and the total gross chartered freight should be settled at the port of loading before the steamer sailed, "charterers' liability to cease upon shipment of cargo (provided such cargo be worth the bill of lading freight, dead freight, and demurrage at port of shipment). Vessel to have a lien on cargo for recovery of all such bill of lading freight, dead freight, demurrage, and all other charges whatsoever." Clause 39 was as follows: "If the cargo cannot be loaded by reason of riots or any dispute between masters and men occasioning a strike or lock-out of stevedores, lightermen, tugboat men, cart men, railway employees, or other labour connected with the working, loading, or delivery of the cargo proved to be intended for the steamer, or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time lost not to be counted as part of the lay-days (unless

any cargo be actually loaded by the steamer during such time), but lay-days to be extended equivalent to the time lost owing to such cause or causes, and, if the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the charterers' or receivers' men only shall not exonerate charterers or receivers from any demurrage for which they may be liable under this charter, if by the use of reasonable diligence they could have obtained other suitable labour, at rates current before the strike, and, in case of any delay by reason of the before-mentioned causes, no claims for damages shall be made by charterers or receivers of the cargo, or by the owners of the ship, or by any other party under this charter. Any time lost by the steamer through any of the above causes to be reckoned as days for loading solely for the purpose of settling the despatch money account. Should any dispute arise under this clause in the loading of the steamer, same to be settled in the Argentine Republic by a committee consisting of two arbitrators, one to be nominated by each party to this contract, and should they be unable to agree the decision of an umpire mutually approved by the two arbitrators shall be final."

The cargo was shipped at Bahia Blanca, and bills of lading were given which stated that the cargo was shipped by F. M. Nicholson on board the steamship *Woodbridge* to be delivered, subject to the terms of charterparty or freight contract, unto the defendants or their assigns, "they paying freight for the said goods, against delivery, in cash, without deduction, the rate of freight to be in accordance with charterparty or freight contract effected at Buenos Ayres, dated January 7, 1905, all the terms and exceptions contained in which charterparty or freight contract are herewith incorporated and form part hereof." It was provided by the bills of lading that the owner or master of the vessel should have "an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of freight and demurrage and all other charges whatsoever."

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The loading of the vessel at Bahia Blanca occupied a longer time than the lay-days specified by the charterparty. There was no dead freight, and the cargo loaded was worth the freight and charges. It was asserted by the defendants that the delay was due to a strike within the meaning of clause 39 of the charterparty, but this was denied by the plaintiffs. When the loading was completed, the captain, on behalf of the plaintiffs, made a claim for 661*l.* demurrage alleged to have been incurred at the port of loading, but the charterers denied that they were liable for demurrage, and proposed that there should be an arbitration upon the dispute in accordance with clause 39 of the charterparty. The master refused to entertain this suggestion and the vessel sailed for Manchester, where she arrived in due course. The plaintiffs claiming a lien upon the cargo for the demurrage, in order to release the cargo, the defendants, as before mentioned, paid the sum of 661*l.* into a bank to a joint account. The plaintiffs having brought this action, the defendants applied under s. 4 of the Arbitration Act, 1889, for a stay in order that the dispute might be referred in accordance with the arbitration clause in the charterparty.

On the application coming before Channell J. at chambers he was of opinion that the words "in the loading" in clause 39 of the charterparty meant "during the loading," and on that ground he refused a stay. He also decided that the case was not one in which, in the exercise of his discretion, he would grant a stay.

The defendants appealed.

July 25. *Pickford, K.C.*, and *Leslie Scott*, for the defendants. The matter in dispute in this action comes within the terms of the provision for arbitration contained in clause 39 of the charterparty, which is not confined, as is suggested by the plaintiffs, to a dispute arising in the course of the loading. In this case the defendants are both charterers and holders of the bill of lading. The contract as between the shipowners and the charterers must be looked for in the charterparty, and not in the bill of lading, which does not as between the ship-

owners and the charterers supersede the charterparty, but only operates as a receipt for the goods: see *Rodoconachi* v. *Milburn* (1) and per Lord Bramwell in *Wagstaff* v. *Anderson* (2) and *Sewell* v. *Burdick*. (3) This is not like a case where the bill of lading has been indorsed by the charterer to an indorsee for value. The case of *Hamilton & Co.* v. *Mackie & Sons* (4) is distinguishable. The dispute in that case arose between the shipowner and the consignee of the goods with regard to bill of lading freight, and the arbitration clause was expressly confined to disputes arising under the charter. The case of *Runciman & Co.* v. *Smyth & Co.* (5), which will be relied on by the plaintiffs, purported to be decided on the authority of *Hamilton & Co.* v. *Mackie & Sons* (4), but the facts of the case did not really bring it within that decision. If there is anything in the decision in *Gullischen* v. *Stewart Brothers* (6) to the contrary of what was laid down in *Rodoconachi* v. *Milburn* (1), the latter case ought to be followed, being later in point of date.

If necessary, the defendants will contend that, on the true construction of the bill of lading, it incorporates the provision for arbitration contained in clause 39 of the charterparty. The bill of lading incorporates the terms and exceptions of the charterparty, so far as not inconsistent therewith, and provides that the shipowners shall have an absolute lien on the cargo for demurrage. The right to demurrage and its amount can only be ascertained by looking back to the terms of the charterparty, including clause 39, the strike clause, which provides for arbitration in the event of such a dispute as has here arisen. There is nothing inconsistent with that provision in the bill of lading. It may be that the effect of the cesser clause is that any right of the shipowners to demurrage must be enforced by means of the lien given on the cargo, and not against the charterers personally; but the existence of that lien for demurrage must depend on the terms of the charter-

(1) (1886) 17 Q. B. D. 316; 18 Q. B. D. 67.
(2) (1880) 5 C. P. D. 171.
(3) (1884) 10 App. Cas. 74, at p. 105.
(4) (1889) 5 Times L. R. 677.
(5) 20 Times L. R. 625.
(6) (1884) 13 Q. B. D. 317.

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party, and the exceptions mentioned in clause 39, which provides the means for determining in certain cases whether demurrage has been incurred; and the bill of lading must be construed as incorporating the provisions of the charterparty for the purpose of determining whether demurrage has been incurred, and therefore the shipowners have a lien for it.

It is not disputed that it is matter of discretion whether the Court will stay the action, and to some extent no doubt it will have regard to the balance of convenience in determining whether it will do so or not. But, as regards any inconveniences which may be occasioned to the plaintiffs by having to proceed to arbitration at the present time in the Argentine Republic, it must be remembered that the parties agreed that any dispute of this kind should be settled there, and the plaintiffs have brought these inconveniences upon themselves by refusing to have the matter dealt with at Bahia Blanca before the vessel sailed from there. They ought not to be allowed to escape from their bargain because they have made it inconvenient for themselves to fulfil it.

[They also cited *Restitution Steam Ship Co.* v. *Pirie & Co.* (1); *Clink* v. *Radford & Co.* (2)]

J. A. Hamilton, K.C., and *A. Adair Roche*, for the plaintiffs. The defendants have to shew, first, that there is a subsisting contract between them and the plaintiffs to refer this dispute to arbitration; and, secondly, that it is under the circumstances convenient and proper that it should be so referred. To take the question as to convenience first: if there is to be a reference to arbitration at Bahia Blanca, the whole action must in effect be referred, and there is no provision by which the arbitrators are bound to submit any questions of law to the Court, nor any machinery by which they can be compelled to do so. The defendants' case is that the delay in loading was occasioned by a strike. The plaintiffs' contention will be that the loading was not delayed by any cause within the meaning of the exceptions in the charterparty. There had no doubt been a congestion of shipping at the port and the vessel had to wait for her turn to load. There are a number of authorities

(1) (1889) 64 L. T. 491. (2) [1891] 1 Q. B. 625.

and nice questions as to what the law of England is where the cause of delay in loading is that the vessel cannot get a turn owing to the congestion of the port. It is not satisfactory that such a question of English law should be determined by lay arbitrators at Bahia Blanca. It appears, according to the defendants' contention, that it may be a nice question of law whether under the circumstances the plaintiffs have obtained a lien on the cargo.

Then, is there any agreement subsisting between the plaintiffs and the defendants to refer this dispute to arbitration? The charterers' liability ceased under the cesser clause when the ship had loaded a full cargo which would cover the bill of lading freight and other charges. That being so, the plaintiffs have no remedy against the defendants personally on the charterparty, but only by way of lien under the bill of lading. It is submitted that the provision for arbitration in the charterparty is not incorporated by the bill of lading. *Gullischen* v. *Stewart Brothers* (1) is an authority in the plaintiffs' favour. That case has never been doubted, and is, it is submitted, good law. The decision there was to the effect that, where the charterparty contained a cesser clause, and the charterers were named in the bill of lading as consignees of the cargo, the liability under the charterparty ceased by virtue of the cesser clause, and the bill of lading became the operative instrument between the parties, but, inasmuch as it incorporated the provisions of the charterparty as regards demurrage at the port of discharge, it could not be read as incorporating the cesser clause as regards the liability of the consignees upon the bill of lading for that demurrage. The charterparty contract ceased in this case by virtue of the cesser clause as soon as the ship was loaded, and the bill of lading cannot be construed as incorporating the provision for arbitration contained in clause 39 of the charterparty, that clause not being consistent with the terms of the bill of lading. To say that the charterparty must be referred to, in order to see what the liabilities as to freight, demurrage, &c., under the bill of lading are, is quite different from saying that a provision in the charterparty as to arbitration

(1) 13 Q. B. D. 317.

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must be incorporated. The cases, such as *Serraino* v. *Campbell* (1) shew that the principle is that the provisions of the charterparty must be treated as incorporated only so far as they relate to what has to be done under the bill of lading. *Rodoconachi* v. *Milburn* (2) cannot be treated as overruling *Gullischen* v. *Stewart Brothers.* (3) In *Rodoconachi* v. *Milburn* (2) the jury had been asked whether the charterers had agreed to accept the bills of lading as mere receipts for the cargo, and they had answered that question in the affirmative. The decision must, it is submitted, be read in the light of that finding. The decision in *Runciman & Co.* v. *Smyth & Co.* (4) is directly in the plaintiffs' favour. It is very difficult to reconcile the view taken in *Rodoconachi* v. *Milburn* (2) with what was held in *Hamilton & Co.* v. *Mackie & Sons* (5), which is really undistinguishable from the present case. It is not easy to work out the dicta in *Rodoconachi* v. *Milburn* (2) and *Sewell* v. *Burdick* (6), upon which the defendants rely. How can the bill of lading only be a receipt in the hands of a charterer, but become a substantive contract in the hands of an indorsee of the bill of lading? [They cited on this point *Turner* v. *Haji Goolam Mohamed Azam.* (7)]

It is further submitted that Channell J. was right in holding that the provision for arbitration in clause 39 of the charterparty does not apply to the case of a dispute arising after the completion of the loading and departure of the ship from the port of loading, but to disputes about incidental questions arising from time to time in the course of the loading, as to the manner of loading to be adopted and such like matters, e.g., as to whether the ship is to take in cargo at more than two hatchways at a time.

Pickford, K.C., in reply. No question of English law will arise on the arbitration. It is not disputed by the defendants that, if the delay in loading did not arise from one of the causes

(1) (1890) 25 Q. B. D. 501; [1891] 1 Q. B. 283.
(2) 17 Q. B. D. 316; 18 Q. B. D. 67.
(3) 13 Q. B. D. 317.
(4) 20 Times L. R. 625.
(5) 5 Times L. R. 677.
(6) 10 App. Cas. 74, at p. 105.
(7) [1904] A. C. 826.

excepted by the charterparty, the demurrage was incurred, and the plaintiffs had a lien for it. The only question which will be raised before the arbitrators will be whether the delay in fact arose from one of the excepted causes.

Cur. adv. vult.

Aug. 7. COLLINS M.R. read the following judgment:—This is an appeal from Channell J., who refused to stay proceedings with a view to a reference under s. 4 of the Arbitration Act, 1889. The plaintiffs are the owners of the steamship *Woodbridge*, and have brought this action for a declaration that they are entitled to a lien to the amount of 661*l.* on a cargo carried in the said steamship from Bahia Blanca to Manchester under a charterparty. The defendants, who are the charterers and also holders of the bill of lading, dispute the plaintiffs' right to the amount claimed, but have paid it into a bank in the joint names of the parties so as to release the cargo. The lien claimed is for demurrage at the port of loading. The defendants contend that the question whether any such demurrage is payable or not depends on clause 39 of the charterparty, which provides that, should any dispute arise under that clause in the loading of the steamship, it shall be settled by arbitration; and they accordingly apply under s. 4 of the Arbitration Act, 1889, to have the dispute referred to arbitration as provided by the clause. The plaintiffs contend that, as a matter of construction, the clause does not cover the dispute in this case, and Channell J. has accepted that view. They also contend that, having regard to the cesser clause in the charterparty and to the fact that the defendants, although charterers, are holders of the bill of lading, the arbitration clause, even if applicable to the facts, cannot be invoked. The main argument before us has been on the latter point.

The charterparty purports to be made between the plaintiffs and F. M. Nicholson as charterer. Nicholson was, in fact, the agent for the defendants. The cesser clause (clause 31) is as follows: [The Master of the Rolls read the clause.] Clause 23 provides for the rate of loading. That clause and clause 39 are as

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follows: [The learned judge read those clauses, and continued:—] First, with regard to the construction of clause 39 itself: I cannot agree with Channell J. that it relates only to a dispute that must arise for settlement before the loading is complete. It seems to me that the dispute arises "in the loading" within the meaning of the clause if the loading is claimed by one party and denied by the other to have been delayed by one of the causes named in the clause, and none the less because the extent of the delay cannot be ascertained until the loading has been completed.

With regard to the point that clause 39 cannot apply by reason of the cesser clause and the fact that the charterers are also the holders of the bill of lading, if the case were free from authority, I cannot think that there would be any difficulty. A dispute has arisen between two parties to a contract by which they have agreed that in an event which has happened there shall be an arbitration. Why is the arbitration not to take place? The fact that the liability of the charterers is to cease on shipment of the cargo cannot affect the matter because the clause is quite independent of whether personal liability subsists or not. It is common ground that a lien subsists if anything is due, and the only question is for what amount. Why is the amount not to be ascertained in the manner provided by the contract? The cesser clause itself cannot bring about this result, and, if it can be reached at all, it must be because of the bill of lading. But the bill of lading in terms provides that "all the terms and exceptions contained in the charterparty or freight contract are herewith incorporated and form part hereof," and further "the owner or master of the vessel shall have an absolute lien and charge upon the cargo . . . . for the recovery and payment of freight and demurrage and all other charges whatsoever." I can see nothing at all inconsistent in the provision of the charterparty that the amount of demurrage at the port of loading is to be ascertained by arbitration at the port of loading, and the provision in the bill of lading that there is to be a lien for the amount, so as to prevent the former provision from operating between the parties to the charterparty, who are also the parties to the

bill of lading. Apart from authority, I think this would be clear.

It is, however, necessary to examine the authorities, and the respondents can certainly vouch one in their favour, which does not seem to be distinguishable—namely, *Runciman & Co.* v. *Smyth & Co.* (1) That case, however, purported to be decided on the authority of *Hamilton & Co.* v. *Mackie & Sons.* (2) This latter case was an action by the shipowner against the indorsee of the bill of lading who was not the charterer, and was for bill of lading freight. The case is very shortly reported, and I will read the judgment of Lord Esher: "The law on the subject had been laid down several times. Where there was in a bill of lading such a condition as this, 'all other conditions as per charterparty,' it had been decided that the conditions of the charterparty must be read verbatim into the bill of lading as though they were there printed in extenso. Then if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading, they were insensible and must be disregarded. The bill of lading referred to the charterparty, and therefore, when the condition was read in, 'all disputes under this charter shall be referred to arbitration,' it was clear that that condition did not refer to disputes under the bill of lading, but to disputes arising under the charterparty. The condition, therefore, was insensible, and had no application to the present dispute which arose under the bill of lading." He treats the dispute in that case as arising exclusively under the bill of lading, and not under the charterparty, and therefore as not covered by the clause which related to disputes under the charter only. Here the dispute arises under the charterparty and is between the parties to it, and, unless as between these parties the bill of lading has annulled this part of the contract of the charterparty, it still subsists and binds the parties. There is no doubt that, where the charterer takes the bill of lading in his own name, the rights and obligations as between him and the shipowner are different from those of a person other than the charterer who has become the holder of a bill of lading purporting to incorporate the charterparty,

(1) 20 Times L. R. 625. (2) 5 Times L. R. 677.

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though the precise extent of the difference is not quite clear. In *Rodoconachi* v. *Milburn* (1), decided in 1886, Lord Esher M.R. says: "In my opinion, even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods"; and he adopts fully what was said by Lord Bramwell in *Sewell* v. *Burdick*. (2) On the other hand, in *Gullischen* v. *Stewart Brothers* (3), decided in 1884 in the Court of Appeal consisting of Lord Coleridge C.J., Brett M.R., and Bowen L.J., it was held that a charterer who was also the bill of lading holder could not set up the cesser clause in the charter as an answer to a claim for demurrage at the port of discharge. "The broad distinction between the position of a charterer, who ships and takes a bill of lading, and an ordinary holder of a bill of lading is, I think, that in the former case there is the underlying contract of the charterparty which remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so. On the other hand, in the case of the holder of the bill of lading who is not the charterer there is no presumption that he contracts in any terms but those of the bill of lading, and, if the bill of lading purports to import the charterparty, the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods: *Russell* v. *Niemann*. (4) With all deference to the learned judges who decided it, I think *Runciman & Co.* v. *Smyth & Co.* (5) is not supported by the authority relied upon, and is not in accordance with principle.

If the clause is operative, as I think it is, between the parties, I think the fact that the ship sailed away from Bahia Blanca without performing its conditions, though pressed to do so,

(1) 18 Q. B. D. 67, at p. 75.
(2) 10 App. Cas. 74, at p. 105.
(3) 13 Q. B. D. 317.
(4) (1864) 17 C. B. (N.S.) 163.
(5) Times 20 L. R. 625.

debars the owners from relying upon the inconvenience of conducting the reference in the Argentine Republic now. I am of opinion, therefore, that the appeal should be allowed.

MATHEW L.J. I am of the same opinion, and I desire to add only a few words. If, in order to dispose of the matter by arbitration, it would be necessary for the arbitrators to decide doubtful questions of English law, I should have been of opinion that we ought not to interfere, or to withdraw those questions of law from the Commercial Court. It seems, however, clear to me that upon the facts no such questions will arise before the arbitrators, and we have the undertaking of defendants' counsel that such questions will not be raised before them. I do not think that it would be proper to remit to a tribunal of arbitrators at Bahia Blanca questions of English law, which they would not be competent to decide, such as the questions, under what circumstances a bill of lading supersedes a charterparty, and whether there is an incorporation of terms of a charterparty in a bill of lading, and, if so, whether it incorporates more than the terms relating to the discharge of the cargo, questions as to which the law cannot be said to be altogether clear. But, the suggestion that such doubtful questions as these would have to be submitted to the arbitrators having been disposed of, the case appears to me to be clear. There seems to be no question as to the construction of the charterparty. It contains the ordinary cesser clause, which substitutes a lien for demurrage for the personal contract of the charterers; and it also contains clause 39, which has been read by the Master of the Rolls, and which was no doubt inserted by the parties with knowledge of a disturbed state of affairs at the port of loading. The ship arrived at the port of loading, and was detained there; and a dispute then arose whether that detention was by reason of one of the matters excepted by clause 39 of the charterparty or by reason of default on the part of the charterers. It seems to me clear that this dispute ought to have been settled at Bahia Blanca as provided by the terms of clause 39 of the charterparty, but the master determined to break the contract in that respect,

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and absolutely refused to proceed to arbitration. On that ground I do not think that the judgment of Channell J. can be supported. He appears to have thought that the charterers were deprived of the benefit of clause 39, because they did not take the necessary steps to get the dispute referred at Bahia Blanca before the ship sailed; but the master would not submit to any discussion of the matter, and at once sailed with the cargo. When the ship arrived at her port of destination the shipowners set up a claim for demurrage, and said they had nothing to do with the provision for arbitration; and the amount in dispute has been deposited in a bank in joint names pending settlement of the question. It was clearly intimated to the shipowners by the defendants that, if they brought an action, an application would be made to stay the action with a view to the matter in dispute being referred to arbitration in accordance with the terms of the charterparty. The shipowners nevertheless commenced an action in the Commercial Court. Thereupon an application to stay the proceedings was made, and we have to say whether it should be granted. I have come to the conclusion that it ought to be granted. I pass by the question of law which has been fully discussed by the Master of the Rolls, and come to the question of convenience. It has been urged on behalf of the shipowners that it would be very inconvenient that the matter should be referred to arbitration at Bahia Blanca after this lapse of time, when the voyage is over, and the captain and crew of the vessel have been dispersed. I am not clear that the captain or any of the crew would be a necessary witness in the arbitration, and in any case, if there is any inconvenience occasioned to the shipowners in this respect, it is their fault and theirs only. Looking at the case from the point of view of the charterers, and endeavouring to see on which side the balance of convenience lies, it must be observed on the other hand that, if the action proceeded in the Commercial Court, it would be necessary for the charterers to bring witnesses from Bahia Blanca, or obtain a commission to examine them there, which must involve serious delay and expense; and I decline to impose on the charterers a burden such as this, against which they have protected themselves by

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the express terms of the charterparty. For these reasons I think that the action should be stayed, and that, only questions of fact appearing to be involved, those questions ought to be disposed of by arbitrators in the Argentine Republic. I think the appeal should be allowed, and, subject to the approval of the Master of the Rolls, I think that the arbitrators should be directed by our order to deal with questions of fact only, and make their award thereon, and that the award, when made, should be brought before the Commercial Court, that the stay of proceedings should continue until the award is so brought before that Court or further order, and that the costs of the action and reference should be dealt with by the Commercial Court. (1)

Appeal allowed.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

E. L.

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[IN THE COURT OF APPEAL.]

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July 29, 31; *Aug.* 11.

SCARBOROUGH AND WIFE *v.* COSGROVE.

Negligence—Boarding-house Keeper—Goods of Guest—Theft by Inmate.

The plaintiffs became boarders in a boarding-house kept by the defendant. They informed the defendant's manager that they had property which they wished to keep under lock and key, and asked for a key of their bedroom door. They were told by the manager that a second key could not be supplied, that they must not remove the key from the lock, as it was required for the purpose of giving the servants access to the room, and that the room would be quite safe as the people in the house were all known. On a subsequent occasion the plaintiffs again became boarders in the defendant's boarding-house, and occupied the same bedroom, in which a chest of drawers had in the meantime been placed. They asked the manager for a key of the chest of drawers, but none was supplied. The female plaintiff having left some jewellery in a locked hand-bag in one of the drawers, it was stolen by another inmate of the house, who had been admitted as a boarder without references, or introduction,

(1) The order ultimately made by the Court embodied these terms.

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or inquiry concerning him, and who turned out to have been previously convicted of theft. In an action by the plaintiffs against the defendant for the loss of the jewellery:—

Held, by Collins M.R. and Mathew L.J., that there was a duty on the part of a boarding-house keeper to take reasonable care for the safety of property brought by a guest into his house, and evidence for the jury of a breach of that duty:

Held, by Romer L.J., that there was a duty on the part of a boarding-house keeper to carry on his business with reasonable care, having regard to the nature and normal conduct of the business, as known to the guest, or as represented to the guest by him, and evidence of a breach of that duty whereby the plaintiffs' property was lost.

Dansey v. *Richardson*, (1854) 3 E. & B. 144, followed.

Holder v. *Soulby*, (1860) 8 C. B. (N.S.) 254, commented upon.

APPLICATION by the plaintiffs for a new trial of an action tried before Darling J. and a jury.

The action was brought by a husband and wife against a boarding-house keeper to recover the value of certain articles of jewellery which were stolen whilst the plaintiffs were inmates of the defendant's establishment.

In the spring of 1904 the plaintiffs became inmates of the defendant's boarding-house as boarders by the week. Shortly after going there the female plaintiff asked for a second key for their bedroom door, telling the manager that they had property which they wished to keep under lock and key. The manager would not supply a second key, and she asked them not to take the key out of the lock, as it was necessary to allow the servants to enter the room. She said that the room would be quite safe, as every one living in the house was well known and the servants had been there a long time. The plaintiffs remained at the boarding-house for some time and then left, but returned again in the autumn and occupied the same room. There was then a chest of drawers in the room which had not been there before, but there was no key belonging to it. They complained of this to the manager, but no key was supplied. The female plaintiff kept her jewellery in a locked hand-bag in one of the drawers. One evening, on going to her room, she found that the bag had been cut open and her jewel case removed. It subsequently appeared that the jewellery had been stolen by a man, who had, after the plaintiffs became

inmates, been admitted into the defendant's boarding-house as an inmate without any reference or introduction, or any inquiry made concerning him, and who turned out to have been previously convicted of thefts. At the close of the plaintiffs' case Darling J. held that a boarding-house keeper was under no duty to take care of his boarders' goods unless they were handed to him for safe custody, and was therefore only liable for misfeasance. He was accordingly of opinion that there was no case to go to the jury, and he directed judgment to be entered for the defendant.

July 29, 31. *Cababé*, for the plaintiffs. It was held in *Dansey* v. *Richardson* (1) that there is a duty imposed upon a boarding-house keeper to take reasonable care of his guests' goods. It is true that the subsequent case of *Holder* v. *Soulby* (2) appears to be in conflict with that view; but it is submitted that, if that be so, the earlier decision ought to be followed as being the more consistent with principle. If there was a duty on the part of the defendant, there was evidence for the jury of negligence by her, or for which she was responsible, in not taking due care of the plaintiffs' goods. The failure to provide a key of the bedroom door, or a key to the chest of drawers, and the statement that all the defendant's guests were well known, coupled with the fact that an unknown person was afterwards admitted as an inmate, without references, or introduction, and without any inquiry, constitute evidence of negligence. Assuming that the failure to supply a key, taken alone, would not constitute negligence, the statement by the defendant's agent that all the guests were known, given as a reason why the plaintiffs need not fear for the safety of their valuables, or insist on having a key, gave rise to an obligation to use care for the safety of the plaintiffs' goods by making due inquiry as to the character of the guests admitted, or otherwise.

Duke, K.C., and *H. Jacobs*, for the defendant. The ruling of the learned judge was correct. It is clearly laid down in *Holder* v. *Soulby* (2) that the mere relation of boarding-house

(1) 3 E. & B. 144. (2) 8 C. B. (N.S.) 254.

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keeper and guest does not give rise to any implication of an undertaking or duty on the part of the boarding-house keeper to take any care in respect of his guest's goods. Mere negligence on the part of the boarding-house keeper in respect of the care of the guest's goods will not give the guest a right of action. There must be something in the nature of misfeasance on the boarding-house keeper's part to do so. No doubt special circumstances might give rise to an obligation on the part of a boarding-house keeper to use care with regard to the safe keeping of a guest's goods, but there were no such circumstances in this case. The decision in *Holder* v. *Soulby* (1) is in conformity with the law as laid down in *Calye's Case* (2), and, it is submitted, should be followed in preference to *Dansey* v. *Richardson*. (3) There was no evidence of negligence to go to the jury, or at any rate of negligence which can be considered as the efficient cause of the plaintiffs' loss. It was not negligence not to supply a key of the bedroom door, or of the chest of drawers. It was for the plaintiffs to choose whether they would remain in the house, or leave valuable goods in the room, if keys were not supplied. A boarding-house keeper is not bound to make inquiries as to the character of persons whom he takes as inmates. It would be impossible for him to do so. The negligence of the defendant, if any, was not the proximate cause of the loss. The crime of the thief, which the defendant was not bound to anticipate, intervened and was the proximate cause of the loss.

Cababé, in reply.

Cur. adv. vult.

Aug. 11. COLLINS M.R. read the following judgment:— This is an appeal by the plaintiffs from the judgment of Darling J. for the defendant in an action brought by the plaintiffs for damages for the loss of jewellery, due, as they alleged, to the negligence of the defendant, in whose boarding-house the plaintiffs were guests. It was admitted that the jewellery was stolen by another guest, who was received into the boarding-house while the plaintiffs were stopping there, and who turned

(1) 8 C. B. (N.S.) 254. (2) (1584) 8 Rep. 32.
(3) 3 E. & B. 144.

out to be a thief well known to the police. The plaintiffs had been stopping in the house some months earlier; and there was evidence that the female plaintiff had told the manager that she had some property with her that she wished to keep under lock and key, and had asked for a second key of the bedroom door; that she had been told in answer that only one door-key was supplied, and that it must not be taken away, as it was required for the purpose of giving the servants access to the room, and that the room would be perfectly safe, as the people in the house were all known. Some months later the plaintiffs came a second time to the house, and were put again into the same room, in which a chest of drawers had been in the meantime placed, but there were no keys for any of the drawers, nor was there any receptacle capable of being locked. The plaintiff complained to the manager, who said she would speak to the defendant. The female plaintiff had with her a jewel case containing jewellery which she required for personal use. She placed the jewel case locked in a locked satchel, which she deposited in one of the drawers. During the plaintiffs' absence from the house in the course of the day of November 26 the satchel was cut open and the jewel case abstracted, and it was for this loss that the action was brought. The plaintiffs contended that the defendant was bound to take reasonable care of the persons and chattels of her guests, and that the system of one key only for the bedroom, which guests were debarred from taking away, the absence of keys for drawers, &c., alone or coupled with the fact that no steps were taken to ascertain the respectability of guests before admission, disclosed a want of due care on the part of the defendant which had led to the loss of their jewellery. Darling J. withdrew the case from the jury, holding that to found liability in a boarding-house keeper "there must be something more than negligence, that there must be something which the law calls misfeasance, and that negligence in this case was not enough." He therefore gave judgment for the defendant. In doing so, he acted on the authority of *Holder* v. *Soulby*. (1) The questions, therefore, are, Was the defendant exempt from liability for

(1) 8 C. B. (N.S.) 254.

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negligence short of misfeasance? If not, was there evidence of such negligence fit for the consideration of the jury?

I think the case cited does go the full length of the proposition laid down by the learned judge; but before examining it I desire to refer to the earlier case decided in the Court of Queen's Bench which seems to me to be in conflict with it, and which I think must be admitted to be of at least equal authority: *Dansey* v. *Richardson*. (1) There the action was brought by a guest at a boarding-house for the loss of a dressing-case stolen while the plaintiff was a guest. There was evidence that the theft was facilitated by the defendant's servant having left the street door ajar. Erle J., who tried the case, in substance directed that a boarding-house keeper "was bound to exercise due and reasonable care as to the guest's property to the same extent which a prudent person would take of her own"; but he told the jury that it would not be enough to fix the defendant, if they thought the servant was negligent, unless they thought the defendant was aware of anything which made it negligent in her to keep that servant. On a rule to shew cause the Court, Lord Campbell C.J. and Coleridge, Wightman, and Erle JJ. were, according to the head-note, agreed that a boarding-house keeper "undertakes by implication of law, although nothing is expressed, to take due and proper care of a guest's baggage," but they were divided on the question of the extent of the liability of the mistress for the servant's negligence, Wightman and Erle JJ. holding that she was exempt unless proved to have been guilty of negligence herself, Lord Campbell C.J. and Coleridge J. holding that there was no distinction between the negligence of the defendant and of her servant in the course of her employment. As to the duty, therefore, there is the authority of the full Court that the boarding-house keeper is bound by implication of law to take ordinary care of her guests' baggage. It is true that in the subsequent case of *Holder* v. *Soulby* (2) Erle C.J., who had directed the jury as above stated, said that he "did not intend to say that a lodging-house keeper was bound to take such care of his lodger's goods as a prudent owner would take of his own pro-

(1) 3 E. & B. 144. (2) 8 C. B. (N.S.) 254.

perty." But, even with this qualification, the first proposition affirmed in *Dansey* v. *Richardson* (1) has the authority of three judges at all events. *Holder* v. *Soulby* (2) was decided on demurrer, and related to a lodging-house only, though I confess this does not seem to me to make any difference in principle. Erle C.J. begins his judgment with these words: "In the first count the plaintiff claims to be entitled to recover on the mere relation of lodger with the landlord and assumes that the law creates a duty on the part of the latter to take due and proper care of his lodger's goods. . . . Now it is clear that no case or treatise or judge has ever affirmed that proposition." This is strange, as six years before Lord Campbell C.J. in *Dansey* v. *Richardson* (3) had said: "I think that the application for a nonsuit was properly refused and that the defendant was not entitled to a verdict on the fourth plea denying that the plaintiff was received into the boarding-house with her goods on the terms mentioned in the declaration"—i.e., to take due and reasonable care of the plaintiff's goods whilst they were in the house and whilst the plaintiff was such guest for hire and reward to the defendant. . . . "The defendant did receive the plaintiff with her goods on the terms . . . . of taking due and reasonable care of her goods while they were in the said house and plaintiff remained such guest therein." Coleridge J. says (4): "Unless it can be established that the defendant was not bound to take any care, it must be admitted she was bound to take due and reasonable care. It seems to me perfectly clear she was bound to take some care, and that my brother Erle was quite right in refusing to nonsuit"; and again (5): "I agree that it"—i.e., the liability of an innkeeper—"cannot be extended in all respects to the boarding-house keeper. But the liability of this last must be measured by what is reasonable." Wightman J. said (6): "I can find no authority for holding that a boarding-house keeper . . . . is bound to take more care about the goods of his guest, which are no further given into his care than by being in his house with the guest,

(1) 3 E. & B. 144.
(2) 8 C. B. (N.S.) 254.
(3) 3 E. & B. 144, at p. 164.
(4) 3 E. & B. 144, at p. 158.
(5) 3 E. & B. 144, at p. 159.
(6) 3 E. & B. 144, at p. 155.

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than he, as a prudent owner, would take with respect to his own. If he is bound to no more care than that, my brother Erle's direction seems to me to be perfectly right." The direction was as shewn above. It is certainly strange that, in view of the passages which I have cited, Erle C.J. should have made the observation which I have quoted. It seems obvious, too, that the other members of the Court were under a misapprehension of the true effect of *Dansey* v. *Richardson*. (1) Byles J. does not allude to it at all, presumably on the ground stated by Keating J. (2): "After the explanation given by my Lord, that case is clearly no authority for the maintenance of this action." But accepting Erle C.J.'s qualification of his own judgment, the passages I have cited from the other judgments cannot be explained away, and, unless they can be explained away, they are decisive of the main point in this case, even if it were assumed that the view of Erle and Wightman JJ. as to the limit of the master's liability for the servant's negligence were to prevail. The case here was withdrawn from the jury, and, if the standard of the defendant's duty was reasonable care, the facts proved might have raised a question for the jury whether they did not establish personal negligence within the limits laid down by Erle and Wightman JJ. in the manager of the boarding-house or in the defendant herself. I think, however, the Court having been equally divided on this particular aspect of the case, and *Holder* v. *Soulby* (3) not touching it at all, we are at liberty to choose for ourselves between the two conflicting opinions. To my mind, the reasoning of Coleridge J. and Lord Campbell C.J. seems conclusive on the whole question, both as to the existence of the duty and the incidental responsibility of the master for the negligence of the servant delegated by the master for the performance of some part of that duty. I think there is a fallacy in the suggestion that, because a boarding or lodging house keeper does not come under the full liability of an innkeeper, he is exempt from all obligation to take care. The instance in *Calye's Case* (4), where it is said that, "if a man

(1) 3 E. & B. 144.
(2) 8 C. B. (N.S.) 254, at p. 270.
(3) 8 C. B. (N.S.) 254.
(4) 8 Rep. 32.

be lodged with another who is not an innholder upon request, if he be robbed in his house by the servants of him who lodged him or any other, he shall not answer for it," does not establish it, and is not inconsistent with a duty to take ordinary care. The object of the illustration is merely to shew that a guest lodging with another is not entitled to the same degree of protection as he would be entitled to in an inn. But the instance confers no immunity upon lodging-house keepers from such liability as would otherwise arise from their receiving into their charge for reward a guest and his baggage. Nor does there seem any reason in principle why they should be so exempt. The general control of the house must be in the keeper. By the nature of the arrangement itself the custody of the lodger's effects must be in him when the lodger is not in his room, and the consideration paid ought as a matter of business to secure some protection for the lodger where the ordinary conditions to which he is expected to conform put it out of his own power to look after his effects himself. I can see no reason why there should be a presumption of immunity in his case from the common duty of a person accepting a charge to exercise at least ordinary care; a fortiori where he undertakes it for reward. The guest and baggage are both in a house of which he has the control, and his obligations to both of them arise in the same way out of the relation itself. It seems to me that the onus lies on those who affirm there is no duty. I cannot help thinking that the notion that such is the law arises from a misunderstanding of the passage about a lodger in *Calye's Case* (1), to which I have already referred. For the reasons I have given, I think *Holder* v. *Soulby* (2) cannot countervail the authority of *Dansey* v. *Richardson* (3), and that the judgments of Lord Campbell C.J. and Coleridge J. ought to prevail where they differ from the other members of the Court.

To come to the facts of this case, if the reason upon which the learned judge acted in withdrawing the case from the jury cannot prevail, I think the evidence raised a question for the

(1) 8 Rep. 32.

(2) 8 C. B. (N.S.) 254.

(3) 3 E. & B. 144.

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jury whether there was a failure of reasonable care on the part of the defendant to which the loss of the plaintiff's jewellery was attributable. I think they were the proper tribunal to decide it, and that we should be usurping their functions if we withheld it from their consideration. I abstain from commenting further on the inferences which might be drawn from the evidence, as I am of opinion that the case must go down to a new trial.

ROMER L.J. read the following judgment:—After the full way in which the Master of the Rolls has dealt in his judgment with the cases of *Dansey* v. *Richardson* (1) and *Holder* v. *Soulby* (2), I do not propose to examine in detail those cases or the judgments delivered in them. But certainly those cases have not left the law concerning the liability of a boarding-house keeper to a paying guest in respect of the latter's luggage in a perfectly settled or satisfactory state, and I think it right, therefore, to state my opinion on the subject. One thing is clear—namely, that the liability of the landlord of the boarding-house in respect of the luggage is not co-extensive with the liability of an ordinary innkeeper, but what the extent of the liability is remains to be considered. It appears to me that, before that can be ascertained, it is necessary, at any rate to a certain extent, to inquire into the particular circumstances of each case. It may be that some of the luggage has been committed temporarily, or during the stay of the lodger, into the sole custody of the landlord. In that case, clearly, there would be a duty on the part of the landlord to take reasonable care of it. On the other hand, there may be cases where, by arrangement between the parties, the guest has taken upon himself solely the care of his luggage, and in those cases, whatever may be the duties of the landlord towards his guest, they could not be treated as based on the footing that in any sense he had the custody or partial custody of the luggage. The difficulty as to the law arises in cases like the present, which are intermediate between the two I have just mentioned, and where the luggage cannot be said to be in the

(1) 3 E. & B. 144.

(2) 8 C. B. (N.S.) 254.

sole custody of either the landlord or the guest. In the present case the luggage was placed in a room which was appropriated as a bedroom for the sole use of the guest, but the guest had not the sole control of the room. The servants of the landlord had the duty and right of coming to the room for all necessary or proper purposes of cleaning and so forth. The key of the room was committed to the care of the guest during the night, or during her visits to the room in the daytime, but at other times the key had to be in the custody of the landlord's servants. The question then arises as to what, if any, is the duty of a landlord in such a case towards his guest in respect of the care of the luggage left in the room. Now I think that it cannot be said that the landlord is under an absolute duty to take reasonable care of the luggage if by the word "care" it is implied that the landlord is in the same position as if the care and custody of the luggage had been committed solely to him. That, in my opinion, cannot be implied, without further knowledge of the facts, merely from the position of a boarding-house keeper towards his paying guest; and I think this was the view taken by Erle C.J. in the cases of *Dansey* v. *Richardson* (1) and *Holder* v. *Soulby* (2), and accounts for many of the observations in his judgments. On the other hand, it appears to me not correct to say that in such a case there is not some duty by the landlord to his guest which may affect the question as to liability for loss of the luggage. Seeing that the landlord carries on his business of a boarding-house keeper for reward, I think he is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty on his part the luggage is lost I can see no reason why he should not be held liable for the loss to the guest. Now in the present action was there or not on the evidence such a sufficient case made by the plaintiffs, the guests, of such breach and consequent loss, as to call upon the defendant, the keeper of the boarding-house, for an answer? On the whole, though at one time I felt considerable doubt on

(1) 3 E. & B. 144. (2) 8 C. B. (N.S.) 254.

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the point, I have come to the conclusion that such a sufficient case was made out, so that, if the defendant did not meet it, the matter was fit for the consideration of the jury, and should have been left to them. Seeing that there is to be a new trial, it is not advisable that the evidence given on behalf of the plaintiffs should be elaborately discussed by us. But I may say that one of the considerations which has pressed on me is that, on the evidence as it stands, unanswered at present by the defendant, the business appears to have been represented by the defendant to the plaintiffs as one where the guests staying in the house were known to the defendant, and where, consequently, there was comparatively little risk in the system adopted by the defendant in the management of the business as to only one key being kept both for the purposes of the guest and the purposes of the defendant's servants: whereas it now appears from the evidence, as it at present stands, that the defendant admitted the guest who stole the plaintiffs' chattels without any knowledge of him, and without any references or introduction, or inquiry as to his respectability. I think, therefore, there should be a new trial.

COLLINS M.R. Mathew L.J. has read, and agrees with, my judgment.

Application granted.

Solicitor for plaintiffs: *J. Westcott.*
Solicitor for defendant: *T. V. Fox.*

E. L.

[IN THE COURT OF APPEAL.]

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Aug. 9.

THE EMILIE MILLON.

Harbours and Docks — Dock Dues — Right to detain Vessel until Dues paid — Maritime Lien for Crew's Wages — Priority — Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. cxcii.*), *ss.* 248, 253.

Sect. 253 of the Mersey Dock Acts Consolidation Act, 1858, which provides that while any dock tonnage rates remain unpaid in respect of any vessel liable thereto the Mersey Docks and Harbour Board may cause such vessel to be detained until all such rates have been paid, gives the board a paramount right to detain a vessel until the dock tonnage rates due in respect of her are paid, notwithstanding that the master and crew of the vessel have a maritime lien upon her for wages due before she entered the dock.

APPEAL from an order made by the judge of the Court of Passage of the city of Liverpool.

The appellants were the Mersey Docks and Harbour Board, who were the owners of docks at Liverpool, and the respondents were the owners and the master and crew of the Russian sailing ship *Emilie Millon*. The *Emilie Millon* arrived at the port of Liverpool and entered the appellants' docks, and she thereby became liable to pay to the appellants dock tonnage rates. At the time when the ship entered the dock wages were due from the owners of the *Emilie Millon* to the master and crew, who had a maritime lien on the ship in respect thereof. While the ship was in dock an action in rem was brought in the Court of Passage of the city of Liverpool (Admiralty jurisdiction) by the master and crew for the enforcement of their maritime lien. The master and crew recovered judgment in that action, and, while the ship was under arrest under a warrant from the Court, an order was made for her sale by auction by the marshal of the Court. An attempt to sell by auction having failed, she was sold by private treaty for 250*l.* At this time dock tonnage rates in respect of the ship were due to the appellants, who had the right under s. 253 of the Mersey Dock Acts Consolidation Act, 1858, to detain her until all such rates were paid. A summons was accordingly taken out in the Court of Passage directed to, among others, the appellants,

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calling upon them to shew cause why the sale of the *Emilie Millon* by private treaty for 250*l.* should not be sanctioned by the Court, and why the lien of the appellants for their charges should not be transferred from the *Emilie Millon* to the fund when in court. The appellants appeared on the summons and opposed the latter part of the application. The learned judge made an order of which the part material to this appeal was: "That the sale of the ship the *Emilie Millon* be confirmed, and that the vessel be delivered to the purchaser free from all claims and demands against her on payment of the purchase-money into court less" the auctioneer's "charges. That the marshal's account be taxed and paid out of the money when in court. That any right of the Mersey Docks and Harbour Board to payment of their charges in priority to other claimants which they may be entitled to under their Acts of Parliament be preserved as against the fund in court."

The Mersey Docks and Harbour Board appealed against this order. It was stated that the 250*l.* was not more than sufficient to pay the dock rates and the costs.

The Mersey Dock Acts Consolidation Act, 1858, s. 230, provides that all vessels entering into or leaving the docks shall be liable, according to the tonnage burden thereof, to pay to the Mersey Docks and Harbour Board the rates, thereinafter called dock tonnage rates, mentioned in Sched. B to the Act.

Sect. 248: "Any collector of tonnage rates may receive by way of deposit and on account of the rates to which any vessel may be liable such a sum of money as shall in his opinion be sufficient to cover the amount thereof; and the production of a certificate from him that such deposit has been made shall, as an authority to the collector of customs to allow the entry of such vessel to be made, be equivalent to the production of a receipt for the payment of such rates by the collector thereof, but such vessel shall not be entitled to clearance outwards until a receipt for the full amount of all rates payable in respect of such vessel, signed by some collector of such rates, shall have been produced to the proper officer of customs."

Sect. 253: "While any dock tonnage rates or harbour rates

remain unpaid in respect of any vessel liable thereto, the collector of such rates shall not receive any further or other entry in respect of such vessel, and the board may cause such vessel to be detained until all such rates shall have been paid."

Sect. 254 gives the board the right, if the rates due are demanded and not paid, to apply to a justice, who may issue his warrant to distrain the vessel within the limits of the port, her tackle, apparel, and furniture.

Carver, K.C., and *Leslie Scott*, for the appellants. The learned judge had no power to make an order that the vessel should leave the docks and be delivered to the purchaser before the dock tonnage rates were paid. Sect. 253 of the Mersey Dock Acts Consolidation Act, 1858, gives the dock board an absolute right as against all the world to detain the vessel until the rates are paid. Sect. 248, which allows a deposit to be made where there is any doubt as to the amount of the rates payable, and which authorizes the collector of customs to allow the entry of the vessel to be made—that is, the entry at the Customs before the vessel leaves the port—upon production of a certificate of the deposit, supports the contention that the vessel cannot leave the dock until the dock rates have been paid or a deposit in respect thereof has been made. The order appealed against violates both those sections. The Act does not give the board any charge upon or right against the purchase-money if the vessel is sold; it simply gives a right to detain the vessel until the rates are paid. The dock board have nothing to say to any question between the vendor and the purchaser of the vessel; they have no concern with any rights of third persons whether by way of mortgage or maritime lien as against the vessel or the owners. Those third persons cannot stand in any better position with regard to the dock board than the owners of the vessel. The board cannot be compelled to look to any fund for payment of the dock rates. The judge has no power to make any such order. The only order the judge could have made was one confirming the sale and directing the vessel to be delivered to the purchaser upon payment of the dock rates. Moreover, even if the judge could

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give the board a charge upon the fund, the order has not done so. It only purports to give the board such right to payment of their charges out of the fund in priority to other claimants as their Acts give them. Their Acts give them no right at all against the fund, and therefore, in any view of the matter, if the vessel is allowed to leave the docks before the dock rates are paid, the board will lose their statutory remedy, and no other sufficient remedy is available for them. The order ought, therefore, to be discharged.

J. W. Ross Brown (*F. A. Greer* with him), for the respondents, the master and crew. Sect. 253 of the Act only gives a right to detain the vessel for dock dues subject to the maritime lien of the master and crew for wages. When the vessel entered the docks the maritime lien had already attached, and the statutory right of detention conferred by s. 253 does not override the maritime lien of the master and crew. As was said in *The Ripon City* (1), a maritime lien "is, so to speak, a subtraction from the absolute property of the owner in the thing." The vessel goes into dock with that lien attaching, and the dock board know that if wages are due, as they probably are, there is a maritime lien against the ship for those wages, and with that knowledge they allow the ship to enter the docks. The master and crew, having a maritime lien for their wages, are in a better position than the shipowners. The possessory lien of a shipwright for repairs to a ship does not take priority over the maritime lien of the master and crew for wages earned before the ship went into the shipwrights' yard. So too the right of the dock board to detain the ship is subject to the maritime lien which had already attached. If the contention put forward on behalf of the dock board is sound, a shipowner can always defeat the remedy of the master and crew for their wages by putting the ship into dock. The order is, therefore, right.

The owners were not represented.

COLLINS M.R. It seems to me to be quite clear upon the express wording of ss. 248 and 253 of the Mersey Dock Acts

(1) [1897] P. 226, at p. 242.

Consolidation Act, 1858, that the Mersey Docks and Harbour Board have a right to detain a vessel until all dock tonnage rates and harbour rates payable in respect of such vessel have been paid. The order made by the learned judge of the Court of Passage seems to ignore that right so clearly given by the Act, because it orders the vessel to be delivered to the purchaser free from all claims and demands against her, and it purports to preserve to the board as against the fund in court any right which their Acts may give them to payment of their charges in priority to other claimants. The board have no such prior right or charge. The only protection which s. 253 gives them is the right to detain the vessel until the dock dues are paid, and nobody can, against the will of the board, undo or annul that statutory provision. With respect, the order of the learned judge seems to me to have been misconceived, and it must be set aside.

ROMER L.J. I quite agree. The Mersey Docks and Harbour Board have a right by statute to detain the vessel until the dock tonnage rates and harbour rates are paid. That is an express statutory right, and the board have nothing to do with any sale of the vessel to a purchaser. That is a matter which only concerns those who are interested in the vessel. It does not concern the board. The board are entitled to detain the vessel, whoever is the owner, until the rates are paid. The order appealed against deprives them of that right, and without their consent purports to give them an option to try and make some claim to a lien upon or right against the fund in priority to other claimants. The board have no such lien or right. If this vessel had been allowed to leave the dock, the board would have been left to make a futile claim against the fund in court. The order is clearly wrong, and must be discharged. The matter must be remitted back to the judge with the direction that, so far as the Mersey Docks and Harbour Board are concerned, no order can take away their statutory right without their consent.

MATHEW L.J. I am of the same opinion. It seems to me that the terms of s. 253 are clear and reasonable. It gives the

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board a right to detain the vessel until the dock dues are paid. It is contended on behalf of the respondents that we ought to read into the section a proviso that the right of the board to detain a vessel shall not be operative if there are maritime liens upon the vessel created before she came into dock. If that were so, in every case where a vessel arrived at the dock, the burden would be imposed upon the dock owners of inquiring whether there were any claims upon the vessel, and of making up their minds whether the vessel ought to be allowed to come into dock. It seems to me incredible that the Legislature should have intended to put any such obligation upon the dock owners. The literal construction of the statute is in their favour, and the order must be set aside.

Appeal allowed.

Solicitor for appellants: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

Solicitor for respondents: *R. Steinforth, Liverpool.*

A. M.

THE MAYOR, &c., OF WEDNESBURY *v.* LODGE HOLES COLLIERY COMPANY.

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May 29, 30.

Local Government—Urban Sanitary Authority—Highway—Subsidence caused by Mining Operations—Measure of Damages.

The defendants were the owners of a mine extending under a highway which was vested, under s. 149 of the Public Health Act, 1875, in the plaintiffs as the urban sanitary authority. While lawfully working the mine the defendants let down the surface of the highway, which the plaintiffs restored to its former level. In an action by the plaintiffs to recover damages for the injury to the highway:—

Held, that the proprietary right of the plaintiffs in the highway was a limited right only, and was confined to what was necessary to maintain the road as a highway, and that the proper measure of damages was not the cost of restoring the highway to its original level, but the cost of making it as commodious as before to the public.

Further Consideration of an action tried at Birmingham by Jelf J.

The plaintiffs, who were the urban authority for the borough of Wednesbury, sought to recover damages from the defendants for injury caused by their mining operations to a highway which was vested in the plaintiffs as the urban authority under s. 149 of the Public Health Act, 1875. It was admitted at the trial that the mining operations of the defendants had in fact caused the road and the surrounding land to subside to a considerable extent, and the question resolved itself into one of the measure of damages. The plaintiffs claimed that they were entitled to recover the cost incurred by them of restoring the road to its original level, which amounted to about 400*l.* The defendants alleged that they were not liable for the cost of restoring the road to its original level, and that it could have been rendered as commodious as before for the use of the public at a cost of 60*l.*, which sum they paid into court; at the same time they paid into court a further sum of 20*l.*, while alleging that they were not liable for anything in excess of 60*l.*

Hugo Young, K.C., and *Vachell*, for the plaintiffs. The proper measure of damages is the cost of restoring the highway to its original level. The road had vested in the plaintiffs

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under s. 149 of the Public Health Act, 1875, as the urban authority, and that vesting gave them a proprietary right over the highway analogous to that possessed by a private owner over a private road constructed on his own property; when the surface of the highway was let down in consequence of the working of the defendants' mines, they were entitled, as a private owner would be, to restore it to its original level before the subsidence occurred. It is not reasonable that, because the highway can be rendered as commodious as before for public use at a less cost, the highway authority must acquiesce in the permanent lowering of the level of the road or restore it to its original level at the cost of the ratepayers, and not of the wrong-doers who let it down.

[They further contended that the restoration of the road to its original level was necessary in order to make the road as commodious as before to the public.]

Shearman, K.C., and *Disturnal*, for the defendants. The proprietary right which the plaintiffs acquired in the highway, by reason of its vesting in them under s. 149 of the Public Health Act, 1875, is not an absolute right, and is not analogous to the right of a private owner over a private road constructed on his own land; it is a limited right only. The subsoil is not vested in the urban authority by s. 149: *Tunbridge Wells Corporation* v. *Baird* (1); and the right of the plaintiffs is confined to what is necessary to maintain the road as a highway, and to protect the public in using it as such: *Coverdale* v. *Charlton* (2); *Attorney-General* v. *Conduit Colliery Co.* (3) They are, therefore, only entitled to recover the cost incurred by them in making the road as commodious as before to the public.

Cur. adv. vult.

May 30. The following judgment was read by

JELF J. This action is brought by the corporation of Wednesbury against the defendants to recover damages for injury caused by their mining operations to a highway called

(1) [1896] A. C. 434. (2) (1878) 4 Q. B. D. 104.
(3) [1895] 1 Q. B. 301.

Dangerfield Lane, which is vested in the plaintiffs as the highway authority under s. 149 of the Public Health Act, 1875. At the trial the defendants admitted that their mining operations had caused the road and the surrounding land to sink to a substantial extent, and that this gave the plaintiffs a cause of action against them; the question, therefore, resolved itself into one of damages. It is to be observed, though it hardly bears upon the particular issue in this case, that the Attorney-General is not a party to the action, and the plaintiffs therefore, in my opinion, can only recover in respect of the damage they have themselves suffered without regard to any ulterior disadvantage resulting to the public.

The plaintiffs claimed 405*l.* as the expense which they had actually incurred in restoring the road in question as nearly as possible to its original level, including the consequential cost of retaining walls to raise the road above the adjoining lands, which remained at their sunken level, and the cost of fences to protect the public from the danger of falling over the precipices so caused. The defendants did not deny that, if the plaintiffs were entitled in principle to claim damages on that basis, the figures were substantially correct, and I find as a fact on that hypothesis that 400*l.* is a fair sum for the plaintiffs to recover. The defendants, however, deny that the measure of damages was what it would cost to restore the road nearly to its original level, and maintain that for a sum of 65*l.* the highway could be made as commodious for the public as it was before, and they paid a sum of 80*l.* into court as sufficient to satisfy the plaintiffs' claim. On the hypothesis that the principle adopted by the defendants was right, the plaintiffs gave evidence that about 95*l.* would have been required to do the work which the defendants put at 65*l.*; but on this part of the case I think that the defendants' figures are more trustworthy than the plaintiffs', and I am satisfied that the sum of 80*l.* paid into court by the defendants is sufficient if the principle for which they contend is correct. The important question at issue, therefore, is upon which basis the damage should be calculated—in other words, What work are the plaintiffs entitled to charge for?

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Jelf J.

The contentions of the plaintiffs were two-fold, one of law and one of fact. In law they contended that their proprietary right in the highway in question entitled them to charge the defendants with the cost of restoring it to its original level; while on the question of fact they maintained that the work which they had done in restoring the road to its old level was necessary in order to make the road as commodious for the public as before, especially as regards the method of dealing with the surface water. I am of opinion that the first contention is not well founded in law. The plaintiffs have, it is true, a proprietary right in the road by virtue of s. 149 of the Public Health Act, 1875, for the purpose of protecting the public in their use of the road; but that right is a limited right, and from a comparison of the cases of *Coverdale* v. *Charlton* (1), *Tunbridge Wells Corporation* v. *Baird* (2), and *Attorney-General* v. *Conduit Colliery Co.* (3), I think it is to be gathered that that right is confined to what is necessary to maintain the road as a highway. Further, s. 27 of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), which was passed to remove doubts created by *Coverdale* v. *Charlton* (1), shews that mines under the highway remain the property of the mine owners, provided that in working them no damage is done to the road. It is not necessary for me to consider whether an injunction could be obtained in the case of apprehended subsidence of the road from its original level, because the cause of action is admitted and the only question is one of damages, and, so long as the road is made quâ road as commodious as it was before, I think that no further damage is recoverable by the plaintiffs. No case was cited in support of the plaintiffs' contention, and the case of *Attorney-General* v. *Conduit Colliery Co.* (3) seems to point to the conclusion that in such a case the damages would be only nominal. Even in the case of a private road, where of course the proprietary right is unlimited, I do not think that a right to recover the cost of restoring it to its original level when sunk by mining operations can be maintained, although,

(1) 3 Q. B. D. 376; 4 Q. B. D. 104. (2) [1896] A. C. 434.
(3) [1895] 1 Q. B. 301.

no doubt, in addition to the cost of making it as commodious as before to the owner, something might be charged for any loss of amenities sustained. A fortiori I do not think that such a right could be successfully claimed by a road authority, which has the limited proprietary right to which I have already referred.

[His Lordship then dealt with the questions of fact, and held that the sum paid into court was sufficient.]

Judgment for the defendants.

Solicitor for plaintiffs: *Thomas Jones, Town Clerk, Wednesbury.*

Solicitors for defendants: *Bower, Cotton & Bower, for Thursfield & Messiter, Wednesbury.*

W. J. B.

[IN THE COURT OF APPEAL.]

SMITH *v.* COLES.

Employer and Workman—Compensation—Employment in Agriculture—Workmen's Compensation Act, 1900 (63 & 64 *Vict. c.* 22).

A workman was employed on a farm as farm carpenter, and assisted at hay and corn harvests, rick-making, and mangel-carting, and did work like the other farm labourers when he was with them. During three months of the year he was employed as gamekeeper. He sustained an injury by an accident, and applied for and obtained an award of compensation under the Workmen's Compensation Act, 1900. On appeal:—

Held, that there was evidence on which the county court judge could find that the applicant was employed in agriculture within the meaning of the Act.

APPEAL from an award of the deputy judge of the Salisbury County Court on an application for compensation under the Workmen's Compensation Act, 1900.

At the hearing of the application the applicant was called as a witness. It appeared from the judge's notes of the evidence that the applicant stated that he had been employed by the respondent for four and a half years as farm carpenter and

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keeper, and that he acted as keeper for three months in the year. He had been taught carpentering by his father, who was a carpenter, and might be described as working carpenter on the farm. He lent a hand at hay harvest and also at corn harvest, but did not go ploughing, and he made corn ricks and straw ricks under the orders of his employer. A carter who worked on the respondent's farm deposed that the applicant helped him with the thrashing, and that he had seen the applicant rick-making, game-keeping, harvesting and mangel-carting, and that he did work like other labourers when he was along with them. No evidence was called for the respondent.

The accident to the applicant happened on November 8, 1904. He had been carpentering all the morning, and the respondent's son said that he had to go to an inclosure. The applicant took tools and went to the inclosure with the respondent's son, who took a gun and shot rabbits on the way. The applicant put in a post and repaired the wire part of the inclosure and the two returned to the farmyard, where the applicant was shot in the leg, by the discharge of the gun carried by the respondent's son, and seriously injured.

On an objection that the applicant's employment was not one to which the Workmen's Compensation Act, 1900, applied, the learned deputy judge held that the applicant was engaged in agricultural employment, and an award was made in his favour.

The respondent appealed.

Robert Wallace, K.C., and *Macgillivray*, for the respondent. The Act deals with labourers engaged in agriculture and not with skilled artisans, in which class the applicant must, from the nature of his occupation as farm carpenter, be placed. On a large farm there is a quantity of work carried on by mechanics which may be ancillary to the conduct of the farm but is not agricultural work, such, for instance, as the work done by a blacksmith, stone-mason, or carpenter. Men mainly employed on such work do not come within the Act of 1900, merely because their work may be indispensable to the carrying on of the farm. So there may be an estate office with clerks whose work, though connected with agriculture, could not be called

employment in agriculture. The Act deals with workmen employed in the cultivation of land used for any purpose of husbandry, and does not extend to such a case as the present.

C. E. Dyer, for the applicant. The suggested restriction on the meaning of "employment in agriculture" to work on crops cannot be supported. For instance, trimming and keeping in order fences is essential to the proper carrying on of the work of a farm. From this point of view carpentering work in mending and keeping up fences and other things must be employment for a purpose of husbandry. Further, the work done by the applicant comprised everything that has to be done in relation to crops except ploughing, and it cannot be said that there was no evidence which supports the finding of the judge.

Robert Wallace, K.C., in reply.

COLLINS M.R. This is an appeal by an employer from a decision in favour of an applicant for compensation under the Workmen's Compensation Act, 1900, which by s. 1, sub-s. 1, applies the Workmen's Compensation Act, 1897, to the employment of workmen in agriculture. The applicant has admittedly received a personal injury by accident, and the question is whether he was employed in agriculture, so that if all other conditions are satisfied the Act applies to his case. The injury was apparently sustained at a time when he was not actually engaged in an agricultural employment, but no point was taken at the hearing of the application as to whether the injury was the result of an accident arising out of and in the course of the applicant's employment, and no such point is before this Court. The only point we have to consider is whether the judge could have arrived at the conclusion that the applicant was engaged in agricultural employment only by a misdirection to himself on a point of law. The suggested misdirection is that as the applicant was a farm carpenter his occupation could not bring him within the Act.

It is necessary to refer to some of the provisions of the Act. Sect. 1, sub-s. 3, enacts: "where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this Act shall apply also to the

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employment of the workman in such other work," and "the expression 'agriculture' includes horticulture, forestry, and the use of any land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry or bees, and the growth of fruit and vegetables." The evidence with regard to the applicant's occupations was that he was undoubtedly a skilled carpenter, but he appears to have acted as a handy man about the farm. He certainly did a great deal of work which could only be described as agricultural work. His own evidence was that he was acting as keeper for three months in the year, but that he lent a hand at hay harvest and at corn harvest, and made corn ricks and straw ricks, but that he did no ploughing. Another witness who worked on the farm said that the applicant had helped him with the thrashing, and that he had seen the applicant rick-making, game-keeping, harvesting, and mangel-carting, and doing work like other labourers. On this evidence the county court judge held that the applicant was engaged in agricultural employment within the Act. There certainly was evidence that this man's work embraced purely agricultural work without taking into consideration the nature of the carpentering work that he did. In these circumstances it is not, in my opinion, necessary to decide whether work which is ancillary to the agricultural work of a farm can itself be treated as agricultural work. I am far from saying that employment in work ancillary to agricultural operations is incapable of being classed as agricultural employment. That is a point that it is not necessary to decide, for it does not arise in this case. There was evidence of employment in what is incontestably agricultural work, and we thus arrive at a question of fact for the decision of the judge on the evidence as to whether the employment of the applicant brought his case within the Act. In the existence of evidence on this point there was no misdirection of himself by the learned judge, and no ground for interfering with his finding, and the appeal against his decision must fail.

ROMER L.J. I also think that this appeal fails. It ought to be remembered that the Workmen's Compensation Acts are

expressed not in technical but in popular language, and ought to be construed not in a technical but in a popular sense. I do not think that it is advisable to attempt to define what is the meaning of the words "employment in agriculture" as used in the Act of 1900. The Legislature has not given a definition, but has only pointed out that the words include certain things as to which there might otherwise have been a doubt. Looking at the words of the Act, and taking them in their popular sense, I think that they cannot be confined to the manual operations of tilling, sowing, and reaping. For instance, suppose a man employed on a farm is mainly occupied in the work of hedging and ditching, I should not be disposed to say that he was not employed in agriculture within the meaning of the Act. In this case I gather from the evidence that the applicant was all his time employed on and for the purposes of the farm. Sometimes he was engaged in what are admittedly agricultural pursuits, at other times he did work essential to the proper conduct of the farm such as the repair of fences, and for part of his time he acted as game-keeper. In these circumstances I cannot say that the judge could not properly come to the conclusion that the applicant was a workman employed in agriculture within the meaning of the Workmen's Compensation Act, 1900.

MATHEW L.J. I am of the same opinion. The Workmen's Compensation Act, 1900, applied the provisions of the former Act of 1897 to a new class of persons. The statute is comprehensive in its terms, and in my opinion the class of persons usually employed in agriculture were intended to be included in the protection afforded by the Act. We are, however, asked to read into the statute an extensive limitation to the effect that it is only to apply to persons engaged in tilling, sowing, and gathering the produce of a farm. No such limitation is indicated in the Act, and if the argument addressed to us is to prevail extraordinary results would follow. A carter would be excluded from the provisions of the Act, or a man who superintended as foreman the work of the labourers. This Court would be slow to adopt an interpreta-

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tion of the Act which would introduce exceptions that have not been made by the Legislature. The question before the county court judge was one of fact, and he decided on ample evidence that the applicant was entitled to the protection of the Act. We cannot interfere with that decision, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for applicant: *Taylor, Hoare & Pilcher, for Nodder & Trethowan, Salisbury.*

Solicitors for respondent: *Beyfus & Beyfus.*

A. M.

C. A. 1905 *Oct.* 27.

[IN THE COURT OF APPEAL.]

ROGERS *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF CARDIFF.

Employer and Workman—Compensation — Engineering Work—Tramway—Employment on Repairs—Physical Area of Undertaking — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

An applicant for compensation under the Workmen's Compensation Act, 1897, was a workman in the employment of a corporation, who were the owners of a system of electric tramways, and his duty was to repair the overhead wires. On the day on which he met with an accident he had repaired the wires at one place by means of a tower-wagon. In proceeding along a street, which followed the line of the tramway, to a place at which he had also to repair the wires, he was thrown from the wagon and injured. On the application an award was made in his favour. On appeal:—

Held, that, having regard to the obligation on the corporation, as undertakers, to repair and keep in repair the whole extent of the tramway system, each act of repair by the workman at different parts of the tramway could not be treated as a separate engineering work, and that it was competent to the arbitrator to find that the accident happened within the area of the engineering work on which the workman was employed, so as to entitle him to compensation under the Act.

APPEAL from the decision of the judge of the county court of Cardiff on an application for an award of compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employment of the corporation of Cardiff, who were the owners of a system of

electric tramways within the borough, and his duty was to repair the overhead wires. This he did by means of a tower-wagon, which was a trolly with a raised platform by means of which he could reach the wires. The trolly was drawn by a horse and was moved to any place at which repairs were required. The applicant had been engaged on and had finished work at a place on the tramway, and was being drawn on the trolly, along a street which followed the line of the tramway, towards a place, at a distance of three quarters of a mile, at which repairs were also required. After he had proceeded about 200 yards from the place at which he had been working the horse took fright, and the applicant was thrown from the trolly and injured. Upon these facts the county court judge made an award in his favour.

The respondents appealed.

Bailhache, for the respondents. No doubt, as decided in *Fletcher* v. *London United Tramways* (1), repairing a tramway is an engineering work, but the accident to the applicant did not happen while he was employed "on, in, or about" such a work. He had been employed on engineering work at a particular spot, but he had left that engineering work, and at the time of the accident was at a considerable distance from the place where it had been done. To bring a case within the Act there must be proximity to the locality where the engineering work is carried on: *Chambers* v. *Whitehaven Harbour Commissioners* (2); *Pattison* v. *White & Co.* (3); *Back* v. *Dick, Kerr & Co.* (4) The applicant in this case had left one locality in which he had done engineering work, and had not arrived near to another at which he intended to do similar work. He was not "about" any engineering work at the time of the accident, and the award of the county court judge should not be supported.

Albert Parsons, for the applicant. The cases that have been cited are not applicable to the present case. In each of them the workman was at the time of the accident at some distance from the engineering work, and was not at that time taking

(1) [1902] 2 K. B. 269.
(2) [1899] 2 Q. B. 132.
(3) (1904) 20 Times L. R. 775.
(4) [1905] 2 K. B. 148.

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any part in it. The locality of an engineering work is more difficult to fix than that of, for example, a factory, and to arrive at the area in which the work is being carried on it is necessary to look at the nature of the work itself. The work undertaken by the corporation was the keeping the continuous line of the tramway in repair. Work which has to be done over continuous premises cannot be divided into a series of discontinuous works. The applicant's duty extended over the whole line, and was to do repairs wherever they were necessary, and the conclusion of the judge that the Act applied was correct. The principle suggested as governing this case has been recognised in the Court of Session in *Middlemiss* v. *Berwickshire County Council*. (1) In that case the workman was employed on the watering of a road to facilitate the rolling of it with a steam-roller, and though the water-cart was at the time of the accident on a different section of the road from that in which the steam-roller was being used, the Court decided that the workman was engaged on engineering work. To come to this conclusion they must have treated the area of the engineering work as co-extensive with the area of the road which was under repair.

COLLINS M.R. The conclusion to be arrived at, as in most of these cases, turns upon a question of fact, as to which the learned county court judge has given a decision, and unless it is possible to point to a misdirection by the judge to himself this Court cannot interfere with his finding.

The question in the case is as to engineering work, and it is only by referring to the engineering work that was undertaken by the respondents that their liability can be determined. The argument addressed to us by counsel for the employers, to the effect that engineering work embraces the idea of a certain physical area, was well founded, and the applicant for compensation must have been on, in, or about that physical area. The word "about" has been discussed in several cases, but one element in determining liability is that the work of the labourer must be concerned with the business of the undertakers, the

(1) (1900) 2 F. 392; 37 Sc. L. R. 297.

other element being that of proximity—that is, that the accident must happen in the course of work done either on or close to the engineering work of the employers. That consideration brings us to this: What were the physical limits of the work undertaken by the employers? The county court judge has defined those geographical limits, and has found that they include the point where the accident happened, or at all events that it happened close to those limits. It has been contended on behalf of the employers that the area of the engineering work on which the man was engaged was not co-extensive with the tramway system, but must be determined with reference to particular work on which he was for the time being employed, so that when the workman left one place at which he had been at work he got out of proximity to that engineering work, and had not reached the limits of the other engineering work which he had to execute. If that were the true view, there would be ground for saying that the learned judge had misdirected himself. In my opinion there was evidence on which the learned judge was justified in arriving at the conclusion that the area of the work on which the applicant was engaged was co-extensive with the tramway itself. The persons sued are the undertakers, and the area of their undertaking cannot be defined without taking into consideration the work which they have to do. The learned judge has found as a fact that the area over which the obligations of the undertakers extended was the whole length of the tramway. It was competent for him so to find, and that the applicant was employed to do such work as was necessary and obligatory on the respondents as such undertakers. It is obvious that repairs would be required from time to time in the tramway line and in the overhead wires, and that it was necessary to ascertain where defects existed and to amend them. On this work the applicant was engaged, amending defects first in one place and then in another, but at all times within the physical area to which the obligations of the undertakers extended. In these circumstances I think that the county court judge could, without any misdirection, arrive at the conclusion that the accident happened within the physical area of the engineering

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work on which the applicant was engaged. The decision in favour of the applicant must therefore stand, and this appeal fails.

ROMER L.J. I am of the same opinion. I think that the learned judge has proceeded, in dealing with the case, upon a right principle of law, and has arrived at a right conclusion of fact when applying the principle of law. The Workmen's Compensation Acts are not to be construed in a narrow or technical spirit, and it would be doing so to give effect to the contention on behalf of the employers. It is important to consider what was the work which was undertaken by the corporation. It was to repair and keep in repair a tramway, and the area of the undertaking was the tramway as a whole. To carry out that general work they employed the workman who was injured. In the course of that work the man had repaired one portion of the line with a machine furnished by his employers for the purpose, and he was proceeding to another portion of the line which required repair. While he was so doing he was injured by an accident, and the question is whether he was injured in, on, or about an engineering work within the meaning of the Act. In my opinion it would not be proper to sever the two things—the work that he had done and the work that he had to do—and to treat them as separate engineering works. Taking them, as I think that they should be taken, as parts of one engineering work, in proceeding from one to the other he was in, on, or about an engineering work, and the decision of the learned judge was right, and the appeal fails.

MATHEW L.J. What has to be ascertained in this case is the limit of the engineering work on which the applicant was engaged. It is said on his behalf that the limit is to be found in the entire length of the tramway, because the undertakers were bound to keep the whole length in repair, and the man was employed to carry out that obligation. On the other hand, it is said that the limit is to be ascertained with reference to the place where each piece of work was to be done. There is

nothing in the Act itself, or the decisions that have been referred to, that supports this latter view. In the case of *Back* v. *Dick, Kerr & Co.* (1) the workman was employed in stacking rails intended to be used in making a tramway. He had nothing to do with the ultimate destination of the rails, and could not be said to be employed on engineering work on the tramway when his occupation was to stack the rails elsewhere. In *Chambers* v. *Whitehaven Harbour Commissioners* (2) the engineering work was the removal of mud and silt from a harbour and placing them in a barge. The workman who was drowned was employed on the barge in taking the mud and silt away, and was, as in the other case, far distant from the engineering work. In *Pattison* v. *White & Co.* (3) the man was sent to a place two miles away from the engineering work to get sand, and his employment was entirely severable from the engineering work for which the sand was to be used. Contrast those cases with the present one. The undertakers are bound to keep the tramway in proper repair, and among other things to see that the overhead wires are in order and safe. The man was employed to carry out this latter obligation of the employers. His duty was, when his services were required, to go to the tramway, with the appliances provided for his work, in a lorry drawn by a horse. While he was being driven from a place at which he had done repairs to another place where the wires were broken he met with an accident. He was employed within the limits of the engineering work indicated by the responsibility which was upon the undertakers, and was injured within those limits, and came within the provisions of the Act. The decision of the county court judge was right and must be supported.

Appeal dismissed.

Solicitors for applicant: *Windybank, Samuell & Lawrence, for Lewis Morgan & Box, Cardiff.*

Solicitors for respondents: *Smith, Rundell & Dods, for J. L. Wheatley, Cardiff.*

(1) [1905] 2 K. B. 148. (2) [1899] 2 Q. B. 132.
(3) 20 Times L. R. 775.

A. M.

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Oct. 25.

STANBURY *v.* EXETER CORPORATION.

Local Government—Diseases of Animals—Inspector appointed by Local Authority—Detention of Sheep by Inspector on suspicion of Sheep-scab—Negligence of Inspector—Liability of Local Authority—Diseases of Animals Act, 1894 (57 & 58 *Vict.* c. 57), *ss.* 2, 35—*Sheep-Scab Order*, 1898.

Local authorities are not liable for the negligence of an inspector appointed by them under the Diseases of Animals Act, 1894, where the alleged negligence is in respect of his having, whilst acting under the provisions of the Sheep-Scab Order, 1898, seized and detained in a market sheep suspected of sheep-scab.

APPEAL from the county court of Exeter.

The plaintiff brought this action in the county court to recover damages from the corporation of Exeter for the negligence of an inspector acting under the Diseases of Animals Act, 1894.

The following facts were proved or admitted at the trial: The plaintiff, a cattle dealer, on September 2, 1904, took a number of sheep to the Exeter market. Heath, an inspector appointed by the corporation under the Diseases of Animals Act, 1894, inspected the sheep while they were in the market and ordered them to be detained, upon the ground that he suspected them of being affected with sheep-scab. The sheep were detained until the following day, when they were removed by permission of the inspector. Evidence was given on behalf of the plaintiff to prove that the inspector had acted negligently in detaining the sheep.

The county court judge held that, as Heath was not acting in performance of any duties imposed by statute upon the defendants, but was acting under and by virtue of an order of the Board of Agriculture (1), the relation of master and servant

(1) The Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 2: "The local authorities in this Act described shall execute and enforce this Act and every order of the Board of Agriculture so far as the same are to be executed or enforced by local authorities."

Sect. 22 empowers the Board of Agriculture to make orders for the prevention or checking of disease and other purposes.

did not exist, quâ the acts complained of, between the defendants and Heath, and that there was no evidence for the jury in support of the plaintiff's claim, and accordingly entered judgment for the defendants.

The plaintiff appealed.

Foote, K.C., and *W. T. Lawrance*, for the appellant. The inspector appointed by the local authority under the Act is their servant, and they are responsible for his wrongful acts as inspector. The duty of executing and enforcing the Act, and of appointing inspectors for that purpose, is imposed upon the local authority, and when an inspector so appointed is enforcing the Act, or any order of the Board of Agriculture made under the Act, he is acting as the servant of the local authority who

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Sect. 35: "(1.) Every local authority shall appoint so many inspectors and other officers as the local authority think necessary for the execution and enforcement of this Act, and shall assign to those inspectors and officers such duties, and salaries or allowances, and may delegate to any of them such authorities and discretion, as to the local authority seem fit, and may at any time revoke any appointment so made."

"(3.) The board, on being satisfied on inquiry that an inspector of a local authority is incompetent, or has been guilty of misconduct or neglect, may, if they think fit, direct his removal, and thereupon he shall cease to be an inspector."

Sect. 49: "(2.) Every order of the board shall have effect as if it had been enacted by this Act."

The Sheep-Scab Order of 1898 (No. 5847), made by the Board of Agriculture on September 13, 1898:—

Art. 2: "An inspector of a local authority on receiving in any manner whatsoever information of the supposed existence of sheep-scab, or having reasonable ground to suspect the existence of sheep-scab, shall proceed with all practicable speed to the place where such disease, according to the information received by him, exists, or is suspected to exist, and shall there and elsewhere put in force and discharge the powers and duties conferred and imposed on him as inspector by or under the Act of 1894 and this order."

Art. 13: "(1.) It shall not be lawful for any person—(*a*) to expose a sheep affected with, or suspected of, sheep-scab in a market or fair. . . ."

Art. 14: "Where a sheep is exposed or otherwise dealt with in contravention of the last preceding article, the inspector of the local authority or other officer appointed by them in that behalf shall seize and remove and detain it, and also, where the sheep is exposed in a market, fair, sale-yard, or place of exhibition, all other sheep in or on such market, fair, sale-yard, or place of exhibition, being or having been in the same flock or in contact with the sheep affected with, or suspected of, sheep-scab. . . ."

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have appointed him. The local authority not only appoint but can dismiss the inspector, and he is under their control. The words of art. 14 of the Sheep-Scab Order of 1898, which provides that "the inspector of the local authority or other officer appointed by them in that behalf" shall seize suspected sheep, shew that whoever is appointed to act is their servant for whose acts in this respect they are responsible.

Clavell Salter, K.C., and *J. A. Hawke*, for the defendants. The corporation can only be liable for the acts of persons whom they order to do certain acts, or of persons whose acts they can control. The defendants appointed the inspector as directed by the Act, and it is not suggested that they appointed an unqualified man, or that there was any negligence on their part. Upon consideration of the provisions of the Act and of the Sheep-Scab Order, it is clear that the inspector was not exercising any statutory duty imposed upon the corporation and delegated by them to him. The inspector is himself directly invested with statutory powers and duties, and cannot be controlled by the corporation in the exercise of those powers and in carrying out those duties. His position is analogous to that of a police officer, for whose acts the corporation who appoint him are not liable. There are no English authorities upon this question, but it has been considered in New York and Ontario: see Beven's Law of Negligence, 2nd ed. pp. 388–9, where a passage from *McKay* v. *Buffalo City* (1) is quoted, and *Forsyth* v. *Canniff*. (2)

[They also referred to *Garlick* v. *Knottingley Urban District Council*. (3)]

LORD ALVERSTONE C.J. I am of opinion that the decision of the county court judge was right, and that he correctly stated the distinction to be drawn in cases of this kind. The action was brought against the corporation of Exeter in respect of an act, which for the present purpose must be assumed to have been negligent, of an inspector who detained some sheep upon suspicion of their being infected with sheep-scab. If this

(1) (1876) 9 Hun (N.Y.) 401, 403; 74 N. Y. 619.
(2) (1890) 20 Ont. R. 478.
(3) (1904) 2 L. G. R. 1345.

had been an ordinary case of delegation by the corporation of duties which they had to perform, or of powers which they were entitled to exercise, then the ordinary rule in cases of master and servant and the doctrine of respondeat superior might apply. This case, however, having regard to the position of the parties and to the statute and the order made thereunder, is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts. The Diseases of Animals Act, 1894, by s. 2 undoubtedly throws upon the local authority the duty of executing and enforcing the Act and every order of the Board of Agriculture "so far as the same are to be executed or enforced by local authorities," and I think that there may be duties which have to be performed by the local authorities through their agents or servants. Under s. 22 of the Act, however, the Board of Agriculture have power to make orders, and by s. 35 there is imposed on the local authority the duty of appointing inspectors for the execution and enforcement of the Act; and it is not unimportant to observe that the board may, under s. 35, sub-s. 3, remove an inspector if he is incompetent or has been guilty of misconduct or neglect, shewing that in this respect the Board are a superior authority over the local authority. Then the Sheep-Scab Order of 1898, made under the Act of 1894, by art. 14 imposes on the inspector appointed by the local authority the duty of seizing and removing and detaining any sheep which is exposed or dealt with in contravention of art. 13—that is, any sheep which is suspected of sheep-scab. The main argument has turned upon the words in art. 14—"the inspector of the local authority . . . . shall seize and remove and detain." The question is whether the local authority are liable if the inspector negligently seizes, removes, and detains. In my opinion the local authority are not liable. To adopt the language of the county court judge, the inspector was not acting in performance of duties imposed by statute upon the defendants, or, in other words, was not performing as their agent duties imposed upon

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Lord Alverstone C.J.

them and delegated by them to him, but was acting in discharge of duties imposed on him as inspector by the order of the Board of Agriculture. If the words "the inspector shall seize and remove and detain" stood alone, it seems to me clear that the responsibilities of the inspector appointed by the local authority are imposed upon him by virtue of the order made under the Act, and not by the local authority as their servant, and that in the manner of discharging those duties he is not controlled by the local authority, but by the superior and paramount authority of the Board of Agriculture. Counsel for the appellant relied on the words in art. 14—"or other officer appointed by them in that behalf." In my opinion those words only indicate that the local authority have the power of appointing, not only inspectors, but also other officers as proper persons to carry out the statutory duties, and do not afford any ground for saying that, because the local authority may direct the duties to be performed by some person other than the inspector, their liability is greater for the acts of the officer discharging those duties. I think, therefore, that the duty imposed upon the inspector was imposed upon him as inspector by the order, and that, whatever may be the remedy of the person aggrieved against him in respect of negligent or improper acts, the county court judge was right in holding that no action would lie against the corporation. This appeal must be dismissed.

WILLS J. I am of the same opinion. It is to be observed that the particular duty, negligence in the performance of which is the alleged cause of action, did not come into existence until the order of the Board of Agriculture was made. There can, therefore, be no question of delegation of authority to the inspector, because the order does not impose upon the local authority, or require them to perform, the duty which is imposed upon the inspector. This case is, to my mind, almost exactly analogous to the case of a police officer. In all boroughs the watch committee by statute has to appoint, control, and remove the police officers, and nobody has ever heard of a corporation being made liable for the negligence of a

police officer in the performance of his duties. I think that the reason why that is so, although it is not stated in any English authorities, is expressed in the passage quoted in Beven on Negligence, 2nd ed. vol. i. pp. 388–9. If the duties to be performed by the officers appointed are of a public nature and have no peculiar local characteristics, then they are really a branch of the public administration for purposes of general utility and security which affect the whole kingdom; and if that be the nature of the duties to be performed, it does not seem unreasonable that the corporation who appoint the officer should not be responsible for acts of negligence or misfeasance on his part. For these reasons I have come to the conclusion that the decision of the county court judge was right, and that the corporation are not liable in this case.

DARLING J. I am of the same opinion. It was sought here to make the defendants, as the local authority, responsible for the act of an inspector appointed by them. The inspector was so appointed in pursuance of the provisions of s. 2 and s. 35 of the Diseases of Animals Act, 1894; and s. 35, sub-s. 3, provides that the Board of Agriculture may remove any inspector of a local authority, who is incompetent or has been guilty of misconduct or neglect, without any regard to the opinion of the local authority in the matter. To my mind the question whether the local authority are liable for the inspector's negligence depends upon whether the act done purported to be done by virtue of corporate authority, or by virtue of something imposed as a public obligation to be done, not by the local authority, but by an officer whom they were ordered to appoint. The particular things which the inspector did here were things which the corporation could not do themselves, and they were not in fact doing them. They had to carry out the Act, and had to do that by appointing an officer. When that officer was appointed he was to be guided by instructions given to him, not by the local authority, but by the Board of Agriculture. It seems to me that the inspector could say to the local authority that, although they appointed him, his duty was to carry out the instructions of the Board of Agriculture. There is an order of

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Darling J.

the board directing the inspector what he is to do, and it is the doing of that which the board ordered him to do that is said to have given a cause of action against the corporation in this case. Now, in my view, it is worth noticing that this statute contemplates two kinds of inspectors. The Board of Agriculture are to appoint inspectors, who are to administer the Act over a wider area than the limited area controlled by the inspectors appointed by the local authority, and no one would contend that an action would lie against any one but the inspector for the acts of an inspector appointed by the board. Why, then, should the corporation be liable for the acts of an inspector appointed by them? The inspector appointed by the board is bound to act as the board direct him. That is exactly the position of the inspector appointed by the corporation, who is bound to do as the board direct him, and can be dismissed by the board. It appears to me, therefore, that these were not acts done by a servant of the corporation or under their authority, but were acts of a public nature done by a public officer appointed by the corporation as directed by the statute. I think that the judgment of the county court judge was perfectly right.

Appeal dismissed.

Solicitors for appellant: *Stow, Preston & Lyttelton, for Friend & Tarbet, Exeter.*

Solicitors for respondents: *Geare & Willis, for A. Dunn, Exeter.*

W. A.

THE SECRETARY OF STATE FOR WAR *v.* WYNNE AND OTHERS.

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Oct. 25, 26.

Crown — Prerogative — Chattels belonging to Crown — Distress for Rent — Privilege—Landlord and Tenant.

The chattels of the Crown on land occupied by a subject are privileged from distress for rent.

APPEAL from the decision of the judge of the Winchester County Court.

The action was brought by the Secretary of State for War to recover from the defendants 30*l.* damages for illegally distraining a horse, the property of the Crown.

The defendant Constance Agnes Wynne was the owner of North Street Farm, Ropley. The defendant Arthur Arnold was her agent, and the defendant George Tanner was a bailiff, duly appointed under the Distress Amendment Act, 1888.

The following statement of the material facts proved at the hearing of the case is taken from the written judgment delivered by the county court judge: By a letter dated October 24, 1902, written by the Quartermaster-General at the War Office, the War Office authorities announced their intention of giving a certain number of surplus horses to each officer commanding a yeomanry regiment, which horses each officer might lend to members of the yeomanry on the terms contained in the letter. In accordance with that letter certain horses were distributed in the district, and amongst others the horse in question was distributed to one H. G. Tibble, who is a member of the yeomanry, and was taken to his farm by him, and kept under the terms of the letter. The farm to which the horse was taken was North Street Farm, the property of the defendant C. A. Wynne, and in the occupation of H. G. Tibble as tenant to the defendant Wynne. On August 7, 1904, there was a sum of 74*l.* due in respect of rent from Tibble to the defendant C. A. Wynne, and the defendant Arnold, by a distress warrant dated August 7, 1904, authorized the defendant Tanner to distrain upon the

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goods, chattels, and effects on the farm for that amount of rent. The defendant Tanner accordingly levied a distress on the farm under the warrant on August 8, and under that distress seized, amongst other things, the horse in question on the farm. All the usual steps were duly and properly taken by the bailiff, and it is admitted that as between the tenant Tibble and the defendants the distress was regular in every way. On September 4 a request was made by Major Holt, commanding the squadron of yeomanry in the district, directed to the defendant Tanner, to surrender the horse as being a Government horse. This the defendant Tanner refused to do. On September 26 Captain Granville, the yeomanry adjutant, made a verbal claim upon the defendant Arnold for the horse, which was refused to be given up. On September 28, after due notice, the horse was sold by the instructions of the defendant Tanner, acting as bailiff, and realized the sum of 9*l.* 10*s.* Further correspondence between the yeomanry officials and the defendants Tanner and Arnold ensued, and on January 31, 1905, the Secretary of State for War issued the plaint in this action.

The learned county court judge gave judgment for the defendants on grounds which may be summarized thus:—

The right of a landlord to distrain for rent was in its origin a common law right, and there was no doctrine which exempted the Crown from the ordinary operation of the common law in this respect, except the doctrine, laid down in the older cases, that where the Crown and a subject had both levied execution upon the goods of a debtor to both, the Crown was entitled to priority and might reap the benefit of the execution before the subject could do so, although the execution on behalf of the Crown was not levied until after that of the subject; and this was so whether the Crown had seized the goods under a writ of extent founded on 33 Hen. 8, c. 39, or by an ordinary execution. But the result of the old decisions appeared to be that if the goods distrained had been actually sold under the distress by the subject before the date of the extent on behalf of the Crown, the subject would be entitled to retain the benefit of the distress and sale as against the Crown. The

question depended, therefore, upon whether at the time the landlord perfected his distress by sale there was any suit or legal proceeding pending under which the Crown then, or at any future time, might enforce its claim to the goods. The principle laid down by Parker C.J. in *Rex* v. *Cotton* (1) governed this case. It was not sufficient that a mere claim or demand for the delivery of the goods seized should be made by the Crown. There must be something equivalent to the extent, that was, formal legal process of some kind actually commenced. Here there had been no legal process commenced on behalf of the Crown before the defendants had perfected their distress by sale. They were entitled to exercise their common law right to distrain for rent the goods of another upon the land occupied by the tenant, and after the sale had taken place the Crown could not enforce any claim to the goods sold.

The plaintiff appealed.

J. A. Simon (*Henry Sutton* and *G. S. Robertson* with him), for the appellant. The decision of the county court judge was wrong. Chattels belonging to the Crown cannot be distrained for rent on land in the occupation of a subject. There is no direct authority on the point, but it appears from old authorities that Crown goods cannot be distrained for rent on land in the occupation of the Crown: Vin. Abr. Distress, 2nd ed. p. 125; Brook, Distress, p. 47. If that be so, it seems to follow that those goods cannot be distrained on land in the occupation of a subject: see Woodfall's Landlord and Tenant, 17th ed. p. 496. In Chitty's Prerogative of the Crown, c. 14, p. 376, it is said: "The King's goods are also exempt from various liabilities which affect the personalty of his subjects. Even if a subject succeed against the King, his Majesty's goods are not liable to be taken in execution. The King is not liable to pay taxes, toll, pontage, passage, custom or poor-rates; nor is his personal property subject to the laws relative to wreck, estrays, waifs, sale in market overt, distress damage feasant, or the like"; and in Manning's Exchequer Practice, 2nd ed. p. 59, it is said: "Nor are the King's cattle distrainable damage

(1) (1751) Park. Rep. 112.

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feasant in alieno solo." In *Rex* v. *Priorem de Okeborne* (1) it appears from the King's Remembrancer's memoranda that the Prior of Okeborne, who had seized the King's sheep, damage feasant, whilst on the prior's land, pleaded that he did not know when the sheep were seized that they belonged to the King, and as soon as he did know he gave them up to the King's servants. The case never came to trial, but the memoranda are of some importance as shewing that at that time no legal right to seize the sheep was pleaded or asserted. If the King's cattle cannot be distrained damage feasant, a fortiori they cannot be distrained by the person upon whose land they are found for rent owing to his landlord. All chattels belonging to the Crown are in the legal possession of the Crown wherever they may be, and they cannot be distrained. *Rex* v. *Cotton* (2), upon which the county court judge relied, was only a decision with respect to the priority of the right of the Crown where both the Crown and a subject had taken legal proceedings to establish their right to the same property; that case has no application here, where the question is whether a chattel, admittedly the property of the Crown, can be distrained for rent on land occupied by a subject.

No counsel appeared for the defendants.

LORD ALVERSTONE C.J. I regret that no counsel has appeared for the defendants, because it is impossible to carry in one's memory all the law which has been laid down on such a subject as this; but I have no doubt that, if there had been any substantial authorities against them, counsel for the plaintiff would have ascertained and called our attention to those authorities. In my opinion the decision of the learned county court judge was wrong and cannot be maintained. He has, I think, fallen into the error of supposing that the authorities establish that the Crown must take some proceedings in the nature of legal proceedings before the goods of the Crown can be protected against distress for rent. He says: "It is, in my

(1) Memoranda de Scaccariis, Easter, 22 Edw. 1.
(2) Park. Rep. 112.

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view, not sufficient that a mere claim or demand for the delivery of the goods seized should be made by the Crown. There must, in my opinion, be something equivalent to the extent—that is, formal legal process of some kind actually commenced." It is somewhat difficult to see, when Crown goods are upon a man's property and the Crown claims them, what legal process could be commenced except an action founded on the Crown's claim to the goods, as was the action in the present case. There is no necessity for a writ of extent; indeed, a writ of extent would not be applicable to such a case. The authority upon which the county court judge seems to have relied is only useful for the purpose of shewing that the title of the Crown which is founded upon proceedings takes precedence of the title of the landlord who would otherwise be entitled to his remedy by distress. But there is, in my opinion, a much broader principle involved, namely, that Crown property never was, according to the law of England, subject to distress. The deduction drawn in the passage in Woodfall's Landlord and Tenant, 17th ed. p. 496, seems to me a logical conclusion. The passage is: "There is no modern decision as to Crown property; but it is laid down in the old books that a man cannot distrain during the possession of the Crown; and it would seem to follow that Crown property, even though the Crown be not tenant, is privileged on premises demised to a subject." If, even when the Crown is tenant and owes the rent, Crown property cannot be taken in distress, it would seem a strange thing that such property could be taken for somebody else's rent. Then, if we refer to books of great learning, such as Chitty's Prerogative of the Crown and the authorities there cited, it would certainly seem that there are many instances in which the goods of the King are exempt from liabilities which affect the goods of his subjects. I do not mention all those instances because different considerations may apply to some of them; but two very strong instances are given by Chitty when he states that the personal property of the King is not subject to the laws relative to sale in market overt and distress damage feasant. The old common law right with respect to sale in market overt is, of course, that the buyer

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gets a good title to the goods, and it is the exemption of the Crown from the operation of that common law right that makes the Crown title to Crown goods superior to that of the purchaser who has bought them in market overt. In my opinion, also, a stronger argument could be made in favour of the liability to distress damage feasant of animals which are Crown property than could be made in favour of the liability of Crown property to be distrained for the payment of the rent of other persons because that property happens to be on their land. I am of opinion, therefore, that the county court judge's view was wrong, and that the law as to the protection of Crown property, which has prevailed for centuries concurrently with the common law right of landlords to distrain for rent, is sufficient to disenable landlords to distrain Crown property. Our judgment ought, therefore, to be for the plaintiff. As to damages, I think substantial justice will be done if we take the lowest figure mentioned, 25*l.*, as being the value of the horse, and enter judgment for the plaintiff for that amount, giving the defendants leave to have a new trial at their own expense if they consider the value is less.

WILLS J. I am of the same opinion. I only wish to add that, to my mind, the utter absence of direct authority upon this subject, considering how far back our books of precedent and abridgment go, is in itself an argument in favour of the proposition for which the appellant contends, because, if Crown goods had been subject to this right of distress, it is difficult to understand how this question should not have arisen before, and found its way into the books.

DARLING J. This, to my mind, is an important and interesting case; and but for what my brother Wills has just pointed out, one would be surprised to find no mention made of Crown goods among the list of things absolutely privileged from distress. But, if one reflects upon what the history of this country has been, why goods are held by the Crown, who has represented the Crown, and whose business it was to seize goods, one would not expect to find that any high

sheriff or bailiff would have ventured to take the goods of William the Conqueror or of succeeding monarchs. I add a few words on this matter because there seems to me to be a real principle involved here, making it manifest that the goods of the Crown are privileged, and for the public good ought to be privileged, from distress. Goods called goods of the Crown are held by the Crown for the public advantage—for the benefit of the whole country—and many of those goods by their very nature are held for the defence of the country by the Crown, to whom the defence of the realm is confided. This very horse was, it has been said, one which had been used in the Boer War, and which might again be required at any moment for the defence of this country. It seems to me, therefore, that any one who had to consider this matter from the beginning would say that, among goods which ought not to be liable to be seized for rent due to anybody whether by the Crown or by anybody else—a fortiori by anybody else—should be those things which belong to the Crown, because the Crown has to keep this country defended against its enemies, of whom it always has plenty. Now it is worth noticing, I think, that all goods, with certain well-known exceptions, even the goods of a stranger, are subject, if they be on demised premises, to distraint for rent owing by the tenant of those premises. If the goods of the Crown were not absolutely privileged it must constantly happen that, when an expedition is being sent abroad, horses belonging to the Crown, and military stores the property of the Crown, would have to be temporarily placed in some building on their way to the seaport from which they were to be embarked, or in sheds or buildings actually at the seaport; and it might well be that those premises, when the goods or horses were placed there, were held by a person who had not paid his rent. Can any one suppose that it is tolerable for a moment that things absolutely necessary to a military expedition should be liable to be seized and held and sold after all the formalities necessary to distress for rent, and the military expedition perhaps delayed while this enforcement of the civil right went on? I should have been very much surprised if anybody could have pointed to a case

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in which the goods of the Crown on the way to the field of Agincourt or of Waterloo had been seized—let us say at Southampton. It seems to me clear that what could not possibly be tolerated in the case of those expeditions cannot be supported now in the case of this horse, which was held by the Crown manifestly for the purpose to which I have alluded, namely, the defence of the country.

Judgment for the appellant.

Solicitor for appellant: *The Solicitor of the Treasury.*

W. A.

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Oct. 26.

[IN THE COURT OF APPEAL.]

OSMOND *v.* CAMPBELL & HARRISON, LIMITED.

Employer and Workman—Workmen's Compensation—Dependants in part on Workman's Earnings—Mode of assessing Compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *First Schedule*, s. 1 (*a*), (*ii.*).

The widow of a deceased workman, who met his death through an accident arising out of and in the course of his employment, was mainly dependent upon her husband's earnings at the time of his death, but was earning about 2*s.* a week herself. The deceased workman did not appear to have had any source of income other than his wages. The widow claiming compensation under the Workmen's Compensation Act, 1897, against the employers of the deceased, a county court judge awarded her the sum of 150*l.*, being 5*l.* less than the amount of the deceased workman's earnings in the same employment during the three years prior to the accident. The employers appealed against the award, on the ground that, in assessing the compensation, the county court judge had not complied with the provisions of the Workmen's Compensation Act, 1897, First Schedule, s. 1 (*a*), (ii.), which provides that, in cases of partial dependency, the compensation shall be such a sum as may be determined to be reasonable and proportionate to the injury to the dependants, because he had not taken into account the amount which the maintenance of the workman, if alive, would have cost, by way of reduction of the compensation, and that he had therefore misdirected himself:—

Held, that it was not shewn that the county court judge had proceeded otherwise than in accordance with the provisions of the Workmen's Compensation Act, 1897, First Schedule, s. 1 (*a*), (ii.), and therefore his award was good.

APPEAL by the employers of a deceased workman against an award by the judge of the Bradford County Court upon a claim

for compensation under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of the deceased workman, who had been in the employ of the appellants as a woolcomber, and whose death had been occasioned by anthrax accidentally contracted in the course of his employment. The total amount of the earnings of the deceased workman in his employment during the three years next preceding the accident was 155*l.* It did not appear that he had any source of income other than his wages. The applicant, though mainly dependent on her husband's earnings at the time of his death, appeared to have earned small amounts by doing washing, which on the average amounted to 1*s.* 10½*d.* a week. The learned county court judge awarded the applicant 150*l.* by way of compensation, without stating how he arrived at that amount.

J. A. Compston, for the employers. The learned county court judge must have found, as the fact was, that the applicant was only partially dependent on the earnings of the deceased workman at the time of his death, because he has given an amount less than the deceased's earnings during the three years previous to the accident. Therefore the case must be treated as coming within clause (ii.) of s. 1 (*a*) of the First Schedule to the Workmen's Compensation Act, 1897. That clause provides that, where the workman leaves dependants only in part dependent upon his earnings at the time of his death, in default of agreement, the compensation shall, subject to the limitation that it must not be larger than could be awarded in case of total dependency, be such sum as may be determined by arbitration under the Act to be reasonable and proportionate to the injury to the dependants. Here it is demonstrable from the figures that the county court judge did not act on the principle indicated by the terms of clause (ii.), for he has, apparently, not taken into account, as he ought to have done in order to ascertain the injury to the applicant, the amount which the workman's maintenance would have cost if he had been alive. He has given 5*l.* less than 155*l.*, the

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amount which would have been payable under clause (i.), if the dependency had been total. That sum spread over a period of three years would only amount to about 33*s.* a year for the workman's own maintenance.

[ROMER L.J. The county court judge has awarded less than three years' earnings of the deceased. How can we say that the sum so awarded is more than proportionate to the injury to the applicant? Clause (ii.) of the section appears to contemplate that the sum awarded under it may be as much as would be payable under clause (i.), for it says "not exceeding in any case the amount payable under the foregoing provisions."]

If the deceased man had some source of income other than his earnings, which would cover his maintenance, then no such deduction as that suggested would have to be made, but otherwise, subject to the limit mentioned in clause (ii.), the amount ought to be proportionate to the injury to the dependant, and therefore ought to be calculated with regard to the amount which the maintenance of the deceased would have cost. There was no suggestion in this case that the deceased workman had any source of income other than his earnings.

[COLLINS M.R. Clause (i.) of the section provides in cases of total dependency for the awarding of a sum based on the earnings of the workman during a certain period without any regard to such considerations as the amount which the maintenance of the workman would have cost. Why should clause (ii.) in cases of partial dependency proceed on a different footing?]

Clause (ii.) provides in terms that in cases within it the compensation shall be such sum as may be determined to be proportionate to the injury to the dependants. It is submitted that the intention is that the compensation which would be given in cases of total dependency shall in cases of partial dependency be reduced, so as to be proportionate to the amount of loss suffered by the dependants. The judgment of Lord Halsbury L.C. in *Main Colliery Co.* v. *Davies* (1) indicates

(1) [1900] A. C. 358.

that what is spent as well as what is earned for the maintenance of a family must be regarded in arriving at the amount of the compensation payable for injury to a partial dependant on a deceased workman. It is submitted that on the figures the learned county court judge must have misdirected himself by not taking into account what would have been payable for the workman's own maintenance for the purpose of arriving at an amount of compensation proportionate to the injury to the applicant.

J. J. Wright, for the applicant, was not called on to argue.

COLLINS M.R. This case appears to me to be free from difficulty. The applicant is the widow of a deceased workman, whose death was occasioned by an accident which arose out of and in the course of his employment. There is no doubt that the applicant was in the main dependent upon the earnings of the deceased at the time of his death, though she was earning a small sum weekly herself, which apparently she can still continue to earn notwithstanding her husband's death. The question raised depends on the terms of the Workmen's Compensation Act, 1897, First Schedule, s. 1. The section provides as follows: "The amount of compensation under this Act shall be—(*a*) where death results from the injury—(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer; (ii.) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his

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death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants; and (iii.) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds; (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week, not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound." Therefore, to come within either of those clauses (i.) and (ii.), the applicant must establish the fact of dependency on the deceased's earnings. It is not disputed in this case that the applicant was dependent on the deceased man's earnings except to the extent of the very small sum per week which she was able to earn herself. The scheme of the Act with regard to amount of compensation has to be gathered from the terms of the whole of s. 1 of the First Schedule, including clause (i.), which deals with total dependency, as well as clause (ii.), which deals with a case in which there was not absolute and entire dependency upon the earnings of the deceased workman, but the applicant derived some means of subsistence from another source. The scheme of the Act as expressed in that section does not appear to me to provide for any attempt to appraise precisely the amount of the loss occasioned to the workman or his dependants, and to give an exact equivalent of it to him or them. The scheme appears to be that, for the purpose of determining the amount which employers, upon whom a liability in respect of accidents to their workmen is being imposed without reference to any default on their part, are to pay, by way, not of complete or exact compensation—for that the Act does not purport to give—but of some solatium to the workman injured or his dependants, a rough and ready rule is laid down by providing that, in case of incapacity caused by the accident, the work-

man shall be paid, not the whole amount of his weekly earnings before the accident, but only a weekly sum not exceeding 50 per cent. of them, and, in case of his death resulting from the accident, those wholly dependent on him shall be paid a sum equal to the amount of his earnings during the three preceding years or 150*l.*, whichever of those sums is the larger, but not exceeding in any case 300*l.* The Act, as I have said, does not purport in that case to give full or exact compensation, for the purpose of calculating which it might be necessary to take into account such nice considerations as the deceased workman's expectation of life at the time of his death, the amount which it would have cost to maintain him, if alive, and other similar matters. It has tried to simplify matters by laying down a hard and fast rule, that appears to ignore such considerations as these, which might be very proper to be entertained by a tribunal charged with assessing full and exact compensation for the loss sustained by the dependants. Then, when we come to the case dealt with by clause (ii.), namely, that of partial dependency on the earnings of the deceased workman, the extent of the differentiation contemplated between that case and the case provided for by clause (i.) appears to me to be that, the persons referred to in clause (ii.) being persons who, instead of being wholly dependent on the deceased workman's earnings, were only partially dependent on those earnings, and had some other source of maintenance, the compensation is to be modified to the extent of taking into consideration that other source of maintenance. I do not think that it could have been intended, through the loophole afforded by that difference between the two cases, to open up, for the purpose of assessing compensation under clause (ii.), a vista of entirely new considerations, which would have been inapplicable in cases coming within clause (i.). To the extent which may be proper having regard to the means derived by the dependant from other sources than the earnings of the deceased workman, the compensation may be different from that which would be given under clause (i.) to a person wholly dependent upon his earnings; but it appears to me that any other such consideration as is

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suggested in the present case is as inapplicable to cases coming under clause (ii.) as to those coming under clause (i.). Here the applicant was earning a weekly sum so small as to be almost inconsiderable, but, such as it was, the county court judge appears to have given effect to it; and I can see nothing to shew that he misdirected himself in any way in arriving at the amount of compensation which he has awarded. With regard to the case of *Main Colliery Co.* v. *Davies* (1), the question which there arose was different from that which is raised in the present case, and the case does not therefore seem to me to be in point. The question in that case was whether a father earning wages could be said to be dependent upon the earnings of his child at all. Wholly different considerations were applicable there from those which apply to the present case, where it is not disputed that the applicant was dependent upon the earnings of the deceased workman except to the extent of the very small sum which she was able to earn herself. For these reasons I think the appeal must be dismissed.

ROMER L.J. I agree. The present appeal seems to me to be really an attempt to appeal against the decision of the county court judge on a question of fact. I can see nothing to shew that he misdirected himself, or awarded compensation on a wrong principle. Certainly he has not gone beyond the limit of compensation fixed by the Act.

MATHEW L.J. I am of the same opinion. If the applicant had been wholly dependent on the earnings of the deceased workman, the amount of compensation would have been 155*l*. The dependency was held not to be total, because the applicant earned a few shillings from time to time. The county court judge has taken that into account and has given 150*l*. I can see no reason for thinking that he has misdirected himself in arriving at that amount. I agree with the Master of the Rolls that, for the purpose of construing the terms of clause (ii.) of s. 1 (*a*) of the First Schedule to the Workmen's

(1) [1900] A. C. 358.

Compensation Act, 1897, they must be read together with those of clause (i.) of that section.

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Appeal dismissed.

Solicitors for applicant: *Wrenstead, Hind & Roberts, for Scott, Eames & Mossman, Bradford.*

Solicitors for respondents: *William Hurd & Son, for J. Lister Booth, Bradford.*

E. L.

[IN THE COURT OF APPEAL.]

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ADAMS *v.* SHADDOCK.

Employer and Workman—Workmen's Compensation—"Engineering Work"—Alteration of Railroad—Tramway on Highway—Alteration of Roadway by Telephone Company—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The Workmen's Compensation Act, 1897, s. 7, sub-s. 2, defines "engineering work" as meaning (among other things) any work of alteration of a railroad.

A telephone company, which had statutory powers, employed a contractor to lay certain telephone wires. These wires had to be carried across a public highway, along which a tramway company had, by virtue of statutory powers, laid two lines of electric tramway, an up and a down line. This operation was being carried out in the following manner. A trench had been made in the roadway at right angles to the lines of the tramways up to a point close to the outer rail of the down line. The wires were to be carried along this trench, through a small tunnel under the rails of the down line, along a trench which had been made in the roadway between the up and down lines, and thence, through a tunnel under the rails of the up line, to a trench dug across the remainder of the roadway. A workman in the employ of the contractor, while engaged in making the before-mentioned tunnel under the down line, was killed by a passing tramcar:—

Held (by Collins M.R. and Mathew L.J., Romer L.J. dissenting), that the deceased workman was employed in a "work of alteration of a railroad," and therefore in an "engineering work" within the meaning of the Workmen's Compensation Act, 1897.

APPEAL from the refusal of the judge of the Plymouth County Court to award compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman, who had been killed through an accident arising out of and in the course of

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his employment. The applicant's husband had been in the employ of a contractor, who had entered into a contract with a telephone company to lay certain wires for telephonic purposes. These wires, which the telephone company were laying by virtue of statutory powers, had to be carried across a public highway, along which a tramway with two sets of rails, forming up and down lines, had been laid by a tramway company under a special Act which incorporated the provisions of the Tramways Act, 1870. This operation was being carried out by the contractor in the following manner. A trench had been dug in the roadway at right angles to the lines of the tramway, up to a point about two feet from the outer rail of the down line of the tramway. The wires were to be laid in this trench, and carried thence by a small tunnel under the rails of the down line. A trench had been dug in the roadway between the up and down lines of the tramway, and the wires were to be carried on along this, and thence passed through another small tunnel under the rails of the up line into a trench dug across the remainder of the roadway. The working of the tramway did not appear to have been interfered with by the work. While the deceased workman was engaged in making a hole or small tunnel under the rails of the down line to connect the trench in the road on that side with the trench between the up and down lines, he was killed by a passing tramcar. His widow claimed compensation under the Workmen's Compensation Act, 1897, as having been dependent upon his earnings at the time of his death, on the ground that the deceased workman was employed on or in or about "engineering work" within the meaning of the Act, when the accident occurred, as having been employed in the alteration of a railroad. The county court judge held that he was not so employed. He was in the first place inclined to think that the "work of construction, or alteration, or repair of a railroad" contemplated by s. 7, sub-s. 2, of the Act was work undertaken by or on behalf of the proprietors of the railroad; but, secondly, he was of opinion that the work on which the deceased workman was employed was not construction, alteration, or repair of the tramway. He therefore refused to award compensation.

J. Sankey, for the applicant. The county court judge was, it is submitted, wrong in thinking that the work must be undertaken by the proprietors of the railroad in order to be within the definition of "engineering work" given by the Act. In many cases one company may have statutory powers for making structural alterations, or doing other engineering work, on the property of another company. It cannot have been intended that the workmen employed in doing such work should be excluded from the benefit of the Workmen's Compensation Act, 1897. The real question in the case appears to be whether the roadway upon which tram-lines are laid is part of the tramway, which has been held to be a "railroad" within the meaning of the Act, so that a physical alteration of it is an alteration of a railroad within the meaning of the Act. It is submitted that the tramway cannot be treated as consisting merely of the rails, but must be treated as including that part of the roadway on which they are laid and over which the trams pass, and the space between the lines. By s. 28 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), the tramway company have to repair so much of any road whereon their tramway is laid as lies between the rails of the tramway, and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway. [He cited *Fullick* v. *Evans, O'Donnell & Co.* (1); *Fletcher* v. *London United Tramways* (2); *Coles* v. *Anderson.* (3)]

W. Shakespeare, for the respondents. The only ground upon which the applicant can succeed is that the county court judge has misdirected himself in point of law. Unless he was bound on the evidence in this case to hold that the work being done involved an alteration of the tramway, this Court cannot interfere with his decision. The question is therefore whether he was bound in law, because there was an interference with the physical condition of the surface of the highway between the

(1) (1901) 17 Times L. R. 346. (2) [1902] 2 K. B. 269.
(3) (1905) 21 Times L. R. 204.

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up and down lines of the tramway, to hold that there was an alteration of the tramway, although that interference did not in any way affect the working of the tramway. It was not proved that the tramway company were bound to repair that part of the highway, for it was not proved that the two lines of tramway were laid at a distance of not more than four feet apart. But in any case it is submitted that the work being done did not involve an alteration of the tramway. There was no intention to alter the tramway, or to interfere in any way with it, or the traffic upon it. Nothing was done to the tramway itself, or to the roadway, by way of alteration of it in any respect material to its user for the purposes of the tramway. It cannot be said that, because an opening is made in the road between the two lines of tramway by persons other than the tramway company acting under statutory powers, for purposes having no connection with the tramway, and which opening does not alter the roadway in any way material to the purposes of the tramway, there is, as a matter of law, an alteration of the tramway.

COLLINS M.R. This is one of the numerous conundrums presented by the Workmen's Compensation Act, 1897, and one of which I cannot say that I have been able to find a very clear or satisfactory solution, more particularly having regard to the fact that the members of the Court are not at one upon the subject. I have, however, come to the conclusion, though not with great certainty, because I do not think that the terms of the Act admit of great certainty in interpreting its definitions, that the appeal must be allowed. The question is whether a workman in the employ of a contractor for the construction of a telephone, who, in carrying out his contract, had to make arrangements for the carriage of electric wires across and under a portion of a highway, which was occupied by the lines of a tramway constructed under statutory powers, was employed on or in or about "engineering work" within the meaning of the Workmen's Compensation Act, 1897, such employment being one of the various classes of employment which entitle those engaged in them to the protection of the Act. In this

case the work being carried on was not work with which the tramway company were concerned, as being part of their work. The workman was employed by strangers to them, who had a statutory right to pass wires across their tramway. The mode in which that was being done was as follows. A trench for the reception of the wires had been made in the roadway at right angles to the tramway up to a point about two feet from the outer rail of the down line. The wires were then to be carried under the rails of the down line by means of a small tunnel. Then a trench was made in the roadway in the space between the up and down lines; and the wires were to be carried along that and under the rails of the up line by another small tunnel, and thence by a trench across the remainder of the roadway. The work therefore did involve an alteration of the physical condition of the surface of the road between the up and down lines of the tramway; and in point of fact an opening had been made in that portion of the roadway. The question is whether a person employed in that work was employed on or in or about "engineering work" within the meaning of s. 7 of the Workmen's Compensation Act, 1897, which defines "engineering work" as meaning (among other things) "any work of construction, or alteration, or repair of a 'railroad,'" which has been held to include a tramway. In applying the definition of "engineering work" given by that section, we are justified I think in looking at the general scheme of the Act, which appears to have been to select certain specified classes of employment as the subject of the protection given by its provisions. It seems to me clear that the distinction thus made between different classes of employment was based, to a great extent at any rate, upon the view that the employments so selected were of a specially dangerous character, and the governing idea to my mind obviously was that protection should be given to workmen engaged in work which exposed them to special risks. From that point of view it would be immaterial by whom they were employed in such work. By whomsoever a workman was employed, whether by the owners of the railroad or others, if he was engaged in the work of construction, or alteration, or repair of a railroad, he would come

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within the purview of the Act as being engaged in work of a specially dangerous character, and therefore requiring the protection of its provisions. He would be equally exposed to the risks involved in such work, whether the work was being done at the instance of the owners of the railroad or at that of any other persons. There was in this case, as I have said, a physical alteration of the surface of that part of the road on which the tramway was laid. The question is whether that can be said to be an "alteration of a railroad" within the meaning of the Act. In the last resort the argument that the definition of "engineering work" does not apply to the work in this case appears mainly to rest on the suggestion that the intervening space between the lines of the tramway, being part of a highway, could not be part of a railroad within the meaning of that definition; that, properly speaking, the term "railroad," when applied to a tramway constructed upon a highway under statutory powers, such as that in question, does not include the space between the lines, but is limited to the lines themselves. Inasmuch as that space remains part of the highway, and the highway authority remains responsible for its being repaired, subject to the right of that authority under certain circumstances to call upon the tramway company to repair it, and, in default of their doing so, to do the work themselves, and recover the expenses of it from the company, it is contended that all that space intervening between the lines of rails cannot be said to be part of the railroad, and a person engaged in altering it cannot be said to be employed on or in or about a "work of construction, alteration, or repair of a railroad" within the meaning of the definition. I have come to the conclusion, though not without hesitation and difficulty, that the definition must be taken to embrace the work being done in this case, which did involve an alteration of the physical condition of that part of the road on which the tramway was laid. The question whether the alteration of the part of the road between the lines of the tramway is an alteration of a railroad depends upon what the term "railroad" embraces, taking the definition as expressing what an ordinary man in the street would understand to be meant by the word "railroad." A

great many things were called "railroads" before what is ordinarily understood now by the term "railway" came into existence. Having regard to the definition of the term "railway" given by the Workmen's Compensation Act, 1897, it is clear that tramways are not included in that term, but it has been held that the term "railroad" as used in that Act includes a "tramway." Before the special kind of tramway which is constructed in streets under statutory powers came into existence, other tramways existed. We have been told by the House of Lords to give the terms used in the Workmen's Compensation Act, 1897, their practical, popular meaning, and not to put a technical construction on them. So reading the word "railroad," it appears to me that, as applied to such private tramways as existed in connection with collieries and other such places before street tramways under the Tramway Acts were introduced, it would include the roadway on which the lines were laid as well as the lines themselves. I think that, in connection with such a tramway, the term "railroad" would clearly embrace the means of traffic as an entirety, the whole thing, including both the lines and the soil on which they are laid, and which is included between them. It seems to me, therefore, that an alteration of the surface between the lines of such a tramway would be an "engineering work" within the meaning of the definition given by the Workmen's Compensation Act, 1897. If, as in this case, the contract by undertakers for the work of carrying electric wires across the tramway involved an alteration of the physical condition of the surface between the lines of rails, I think it would involve an "alteration of a railroad," and therefore would be "engineering work" within the meaning of the Act. The question cannot, I think, in the case of a statutory tramway, depend upon whether the tramway company are or are not under a special statutory obligation to repair that part of the road on which their lines are laid. If it can correctly be described as part of a railroad, it is immaterial, as it seems to me, upon whom the obligation to repair it rests. The workman has been employed in the class of work in respect of which the Legislature has thought it right that workmen should have the protection of

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the Act. In my opinion the work is none the less "engineering work," within the meaning of the Act, because the owners of the tramway are not the undertakers of it; and, whoever may be liable for the repair of the part of the road on which the tramway is laid in the case of a tramway made under statutory powers, such as that here in question, it is still part of the railroad, just as would be the case as regards the old kind of private tramways to which I have alluded. It appears to me that the learned county court judge misdirected himself by treating the special obligations imposed upon a statutory tramway company as regards the repair of the roadway as preventing the application of the definition of "engineering work" contained in the Act to the present case, and that on a fair construction of that definition the case comes within it. For these reasons I think that the appeal must be allowed.

ROMER L.J. In this case the county court judge came, in my opinion, to a right decision; and, speaking for myself, I certainly do not see how we can or ought to differ from the conclusion of fact at which he arrived. I come to the conclusion that the workman in this case was not employed in the "construction, alteration, or repair" of a tramway, which has been held to be included in the term "railroad," within the meaning of the definition contained in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. It clearly cannot be contended that, because a tramway is by virtue of statutory powers laid on a public highway, the whole of the public road becomes a tramroad, so that any alteration of any part of it becomes, as a matter of law, an "alteration of a railroad" within the meaning of the definition in the Act; nor, even if the part of the roadway between the up and down lines of the tramway had to be repaired by the tramway company—which, I may say, does not appear to have been proved in this case, but I pass that by—would that fact, in my opinion, make that part of the road so much part of the tramway as that any opening effected in it, or any other such dealing with it, by a stranger to the tramway company, would, as a matter of law, be work falling within the definition as "work of construction, alteration, or repair of a

railroad." It seems to me that, in considering whether an employment is in or about an "alteration of a railroad" within the meaning of the Act, the matter must be looked at from a common sense point of view. When, from this point of view, I ask myself whether this workman was employed in the "alteration of a railroad" in any fair and reasonable sense of the words, I can only say that in my opinion he was not so employed. No alteration of the tramroad as such was ever contemplated or intended; certainly, in my judgment, there was no evidence that any such alteration was ever effected. The workman was employed to lay certain wires for the purposes of telephonic service. Every care was taken not to interfere with the tramway or the working of it. All that the workmen did, as regards the tramway, was that, for the purpose of carrying the wires under the tramway lines, they made a trench on the surface of the roadway to a point near one of the lines of rails, and also in the space between the up and down lines of the tramway, for the purpose of passing the wires through small openings under the lines, in doing which the accident occurred to the deceased workman. Was that work which in a fair and reasonable sense of the words can be said to have been "employment in an alteration of the tramway"? Unless we are bound as a matter of law to say that it was, I should say as a matter of good sense that it had nothing to do with any alteration of the tramway. The workman's employers were not employed to construct, alter, or repair a tramway. On the contrary, the object appears to have been to do the necessary work in connection with laying the telephone wires so as not to interfere in any way with the tramway or the working of it. In my view it cannot be said that, merely because it was necessary, for the purpose of laying the telephone wires, to make an opening in the public road between the up and down lines of the tramway, and to put the wires underneath the rails, operations which in no way really affected the surface quoad the tramway or the working of it, therefore as a matter of law we are obliged to hold that the workman was employed in or about an alteration of the tramway. It

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ought not I think to be forgotten, in dealing with the word "alteration" in this connection, that it is collocated with the words "construction" and "repair" of a railroad. I can only say that, speaking for myself, I am unable to see how, on a fair construction of the words, this workman can be said to have been employed in or about "the construction, alteration, or repair of a railroad," or how we can differ from the county court judge upon what seems to me to be a question of fact with reference to which there was ample evidence to support his finding.

MATHEW L.J. I agree with the conclusion arrived at by the Master of the Rolls. I must say that I cannot share the view expressed by my brother Romer, that the workman in this case was not employed in the "alteration of a railroad" within the meaning of the Workmen's Compensation Act, 1897, and, therefore, was not within the protection given by that Act. What was the operation in which he was employed when he met with the accident which caused his death? Wires had to be carried under the lines of a tramway for telephonic purposes. That was to be done by carrying them along a trench to a point near the rails of the down line, and then passing them under those rails, thence along a trench which was made in the space between the lines of the tramway, thence under the rails of the up line, and so into a trench made across the remainder of the roadway. That being the nature of the operation, it seems to me that it involved an alteration of the tramway, which is so constructed as necessarily to derive support, not only from the soil subjacent to the rails, but also lateral support from the soil on each side of the lines. When the operation was carried through, it would be necessary to fill in the opening that had been made in the roadway between the lines. Suppose that a workman had been injured by an accident while employed in that operation. Would he not clearly have been employed in or about the repair of the tramway? In my opinion the Act was intended to protect workmen against the risks incidental to work of such a nature as this

workman was employed in doing; and I cannot bring myself to doubt that the work contracted for in this case involved a structural alteration and subsequent repair of the tramway.

Appeal allowed.

Solicitor for applicant: *H. Dobell, for J. P. Dobell, Plymouth.*
Solicitors for respondents: *William Hurd & Son, for Bond & Pearce, Plymouth.*

E. L.

[IN THE COURT OF APPEAL.]

COULTHARD *v.* CONSETT IRON COMPANY, LIMITED.

Employer and Workman—Workmen's Compensation—Dependency on Workman's Earnings at Time of his Death—Widow of Deceased Workman—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Upon a claim for compensation under the Workmen's Compensation Act, 1897, by the widow of a deceased workman, it appeared that she had lived with and been maintained by him from their marriage up to June, 1904, when being out of work, he left her and never afterwards contributed to her maintenance. Her only means of subsistence, after her husband left her, consisted of casual work and the charitable gifts of relatives, and she was for a week in the workhouse. About three weeks before his death, which occurred in October, 1904, the husband obtained employment, and he was earning wages, when his death was occasioned by an accident arising out of and in the course of his employment. The widow stated in evidence that, before her husband's death, she was expecting him back every day to provide a home. The county court judge found that she was dependent on her husband's earnings at the time of his death, and accordingly awarded her compensation.

Held, that the facts justified his finding.

APPEAL from an award of compensation by the judge of the Newcastle-on-Tyne County Court under the Workmen's Compensation Act, 1897.

The applicant was the widow of a deceased workman, who met his death through an accident arising out of and in the course of his employment. It appeared that the applicant and her husband had three children, and from their marriage

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up to June, 1904, they lived together, the family being supported by the earnings of the husband. In June, 1904, the husband was out of work, and they had to sell their furniture for the means of subsistence. At the end of June, some quarrel having arisen between them with regard to the proceeds of a sale of furniture, the husband left his wife, taking one of the children, a little boy, with him. His wife never saw him again, and he never again contributed to her maintenance. She stated in evidence that, while he was away, she expected him back every day to provide a home. About a month before his death he sent the little boy back to her. The wife had no means of her own, and, while her husband was away, her only means of subsistence consisted of casual pieces of employment and the charitable gifts of relatives. She was for a week in the workhouse. The husband obtained employment about a month or three weeks before his death, which took place on October 19, 1904, and he was earning wages, when he met with his death as before mentioned. The widow claimed compensation under the Workmen's Compensation Act, 1897, for herself and family, as having been wholly dependent on her husband's earnings at the time of his death. The county court judge found that she was so dependent, and awarded her compensation accordingly.

Ruegg, K.C., and *Meynell*, for the employers. The evidence shews that the applicant was not dependent upon her husband's earnings at the time of his death. The mere fact that the husband was at common law, or under the Poor Law Acts, responsible for the maintenance of his wife is not sufficient to constitute her a dependant upon his earnings within the meaning of the Act. It is quite clear that in point of fact she was not depending upon his earnings at the time of his death, for at that time he was not contributing anything to her support, though he was earning wages. The natural inference from the facts is that the deceased workman had deserted his wife; and, though she stated in evidence that she expected him back, there were no facts whatever proved which could justify such an expectation. The case falls within the decision

of this Court in *Rees* v. *Penrikyber Navigation Colliery Co.* (1) The authorities in the Scottish Courts on this subject seem to some extent conflicting. The case of *Turners, Ld.* v. *Whitefield* (2) is in favour of the view that there is in such a case as this no dependency on the workman's earnings. The cases of *Cunningham* v. *McGregor & Co.* (3) and *Sneddon* v. *Robert Addie & Sons' Collieries, Ld.* (4), tend to some extent in the other direction, and it is difficult to reconcile them with *Turners, Ld.* v. *Whitefield.* (2) "Dependants" is by s. 7 of the Workmen's Compensation Act, 1897, defined to mean such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death. In respect of some of the relatives specified in the Fatal Accidents Act, 1846, there is no obligation on the workman, either direct or indirect, to support them. It cannot have been intended that the meaning of "dependant" should differ in the case of different members of the family according as there was or was not a legal obligation to support them.

Simey, for the applicant, was stopped.

COLLINS M.R. This is an appeal against the decision of a county court judge, who held that a woman was dependent upon the earnings of her husband at the time of his death, and awarded her compensation under the Workmen's Compensation Act, 1897. The contention before us was that on the facts no dependency by the wife on the earnings of the husband was shewn to exist. The facts were briefly these. Some months before the death of the husband he had ceased to live with his wife. He had fallen out of work, and sold his furniture; and, some quarrel having arisen into the details of which it is unnecessary to enter, he went away from the house in which they had been living to another town, and in that sense they were separated at the time of his death. He obtained work about a month before the accident which occasioned his death and was then earning wages. The wife appears, after he left

(1) [1903] 1 K. B. 259.
(2) (1904) 6 F. 822.
(3) (1901) 3 F. 775.
(4) (1904) 6 F. 992.

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her, to have had no regular means of subsistence. She did casual work when she could get it, and received doles from relatives, whose charity really kept her alive. She stated in evidence that she expected her husband back every day to provide a home. Under those circumstances the county court judge came to the conclusion that in point of fact the applicant was dependent upon her husband's earnings at the time of his death. The counsel for the employers contend that this finding was wrong. In order to support that contention, they must shew that the judge arrived at it through a misdirection of himself in point of law, for they cannot quarrel with his finding of fact, if there was any evidence to support it. They have therefore in substance contended that in point of law the facts shew an absence of dependency by the applicant upon her husband's earnings. We therefore have to see whether there was evidence that she was dependent on the earnings of her husband within the meaning of the Act. The term "dependants" is defined by s. 7, sub-s. 2, of the Act as meaning, "in England and Ireland such members of the workman's family specified in the Fatal Accidents Act, 1846 (which includes a wife) as were wholly or in part dependent upon the earnings of the workman at the time of his death." Then the First Schedule of the Act, s. 1, provides what the compensation is to be, where death results from the injury, (i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, and (ii.) if he does not leave any such dependants, but leaves any dependants in part dependent upon those earnings. Now, why was not the applicant in this case dependent upon her husband's earnings at the time of his death? I think that all the facts point to the conclusion that she was so dependent. The husband was undoubtedly earning wages at the time of his death. It is an important fact, as distinguishing this case from *Rees* v. *Penrikyber Navigation Collieries* (1), that the relation in this case was that of husband and wife, so that there was a direct obligation on the part of the workman to support the applicant. It may be the case that, if the wife has means of subsistence irrespective of the

(1) [1903] 1 K. B. 259.

husband, upon which she has a right to rely, and is relying at the time of his death, she may be said not to be in fact dependent upon her husband's earnings. The House of Lords has held that the question whether a wife or other person was dependent upon the deceased workman is one of fact. But I do not think that the wife ceases to be dependent upon her husband's earnings where, as in this case, there is primarily an obligation on him to support her out of his earnings, and there are no alternative means of subsistence upon which she can rely, or on which she is in fact relying, as a substitute for the obligation of the husband. Substantially the same contention as that of the employers' counsel has been put forward in Scotland, namely, that, if from any source the wife was deriving a subsistence without any assistance from the husband, she could not be said to be dependent on his earnings at the time of his death. That was the argument put forward in *Turners, Ld.* v. *Whitefield.* (1) There a woman, who had been living for fourteen years apart from her husband, and was supported by an illegitimate son, was held not to have been dependent upon her husband's earnings at the time of his death. The employers' counsel contended strenuously that the effect of that decision was to exclude in such cases any presumption or inference arising from the legal obligation of the husband to support his wife, and to shew that, where the wife was in fact deriving a maintenance from any other source, she could not be said to be dependent upon her husband's earnings. It was contended that the decision in that case, as a matter of law, negatived the right of the wife to compensation, if in point of fact she was by any means being kept alive at the time of the husband's death without any contribution from him. When that case is examined, it does not, in my opinion, establish any such proposition. The Court seems to have drawn the inference of fact in that case that the wife had other substantial means of subsistence upon which she could and did depend. The grounds of that decision were summarized in a later case, to which I will presently allude, and which to my mind clearly shews that the decision has no application to the present case,

(1) 6 F. 822.

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but rested on the reasonable conclusion of fact that the wife there was depending at the time of her husband's death, not on his earnings, but on another source of subsistence, which she had substituted for maintenance by her husband. The facts in this case appear to me all to point the other way. The applicant had no certain or permanent means of subsistence, but had to live on precarious doles and casual employment. In *Sneddon* v. *Robert Addie & Sons' Collieries* (1) the facts were that in July, 1901, a husband deserted his wife, and thereafter did not contribute anything to her support: she suffered from chronic bronchitis and varicose veins to an extent which incapacitated her from work requiring ordinary exertion, and she became unable to do anything for her own support: her husband having in 1904, in the course of his employment, sustained injuries from which he died, she claimed compensation under the Workmen's Compensation Act, 1897, from his employers: on those facts it was held (dubitante the Lord Justice-Clerk) that the claimant was dependent on the earnings of her husband at the time of his death. Lord Moncrieff made the following valuable remarks in giving judgment in that case: "If in order to constitute total dependency in the sense of the statute, it is essential that the deceased workman was at the date of his death supporting the respondent, the judgment is wrong, because the deceased man did not contribute a farthing to her support from the time that he deserted her in 1901. But I do not think we are tied up to such a construction of the statute. A husband is primarily bound to aliment his wife. Exceptional cases, no doubt, may be figured in which, notwithstanding that primary obligation, the wife could not be said in any reasonable sense to be wholly dependent on his earnings. She might have means of her own, or she might be earning her own livelihood, or she might be living apart from her husband under an express or implied agreement with him that she would make no claim upon him, but look for support either to her own exertions or to her relatives. That was the case recently decided by the First Division of the Court in *Turners, Ld.* v. *Whitefield.* (2) That case in no way conflicts with

(1) 6 F. 992. (2) 6 F. 822.

the Sheriff's judgment. There the parties married in 1889, at which time the husband had four children by a previous marriage, all grown up, and the respondent had several illegitimate children. It was an ill-assorted marriage, and after six months the parties separated by mutual agreement, and the wife never thereafter (during fourteen years) made any demand upon the husband. In this case the facts are widely different." The learned judge then stated the facts in the case before the Court, and proceeded: "Now, as I have said, there may be cases in which a husband's legal obligation to support his wife may be held to be sopited or suspended. But, when that legal obligation, not discharged by the wife, concurs with total destitution on the part of the wife and inability to support herself, the bare fact that at the date of his death the husband was not implementing his obligation is not sufficient to prevent us from holding that the wife was wholly dependent on him. Neither in my opinion is the question affected by the fact that, during the husband's absence and neglect, the wife was kept from starvation by the casual charity of strangers, or even of relatives who might have been bound to support her if her husband had not been alive. Indeed, speaking for myself, I think this point has already been decided by an unanimous decision of this Division in *Cunningham* v. *McGregor & Co.* (1) In that case it is true that the husband, who lived apart from his wife and family, contributed on an average about 5*l.* a year towards their support. But the question raised was not whether the wife was partially dependent upon him—that was admitted—but whether she was wholly dependent upon him. The Court held unanimously that she was wholly dependent on her husband. The argument for the respondents in that case, which was unsuccessful, was that the wife was not wholly dependent on her husband, because she was supported by occasional employment and contributions from her relatives. That argument was negatived by the judgment of the Court, and I need only refer to the opinions of the judges, including my own. I am still of opinion that that case was well decided, and further that it decided the very point before us now."

(1) 3 F. 775.

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That case seems to me directly in point here. The fact that in that case the husband contributed 5*l.* to the wife's maintenance makes no distinction between the cases, for the Court held that the dependency of the wife was not merely partial but complete. The decisions of the Scottish Courts are no doubt not binding authorities in this Court, but they are entitled to the greatest weight. Assisted by those decisions, I come very clearly to the conclusion that the applicant was in this case dependent on her husband's earnings at the time of his death, and therefore that the decision of the county court judge was right.

ROMER L.J. I am of the same opinion. The question is whether the applicant was dependent on her husband's earnings at the time of his death. That question appears to me to be really one of fact. I think that it cannot be said upon the evidence in this case that the learned county court judge could not reasonably have come to the conclusion that the applicant was so dependent. The husband was earning wages at the time when the accident happened. He had, apparently, left his wife to look for work, and had been away about three months, after a previous cohabitation of many years, during which he maintained her. During those three months she had tried as far as she was able to support herself; but it is clear to my mind that she was unable to do so, and she had no source of income of her own upon which she could depend for subsistence. She was therefore dependent on somebody else for maintenance at the time of her husband's death. Seeing that she had a husband who was earning wages, whose duty it was, and who was legally liable to support her, might it not reasonably be inferred that she was dependent on his earnings at the time of his death? I think it might be so inferred, unless there were other circumstances sufficient to justify the conclusion that she had ceased to look to her husband's earnings for maintenance. The evidence before the county court judge in the present case was not in my opinion such as to compel him to come to any such conclusion. I think that upon that evidence he might reasonably come to

the conclusion that she was still looking to her husband for support at the time of his death, and was dependent on his earnings. They had lived together for a considerable number of years, when, in consequence of some quarrel, he left her. He was away for some three months. When he got work a short time before his death, was the wife treating him as then having nothing to do with her life, and as having left her for ever, and in no practical sense regarding him as liable to support her? There was one piece of evidence which seems to me to negative that conclusion. The wife does not appear in giving her evidence to have been unduly favourable to her husband, but she said, speaking of the time that he was away, that she expected him back every day to provide a home. I see no reason to doubt that statement, and that at the time of his death she was looking to him to support her as soon as he was able to do so. I think the reasonable inference from the evidence is that at the time of his death she was dependent on his earnings, and that that dependency was not valueless but substantial.

MATHEW L.J. The case has been argued for the employers on the assumption that it was established by the evidence that the husband had left his wife and children with no intention of ever returning to them. Even if that had been made out, I am inclined to think that the position of the wife would not have been affected, and she would not have ceased to be dependent on her husband's earnings, although he was not willing to perform his duty of maintaining her. But it is not necessary to discuss that question, for I am satisfied that there is no ground on which the county court judge could be called upon to hold that there was a desertion of his wife by the husband. As long as the husband had employment, all appears to have gone well, and the wife was supported by him. Then he fell out of work: the home was broken up, and the husband seems to have gone away in search of work. He took one of the children with him. I should infer from this that sooner or later he intended to resume his former position, and that meanwhile he was desirous of lessening the burden on his wife.

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Mathew L.J.

It is true that after a while the child was sent back to the wife; but it would appear that the man had great difficulty in getting employment. When, about three weeks before his death, he succeeded in obtaining work, he did not, it is true, communicate with his wife or send her money, but he was very likely then in debt, and I do not think that it must be assumed that, if he had lived, he would not have returned as his wife expected. Under these circumstances I do not think that the evidence supports the conclusion that the applicant was not dependent on the deceased workman's earnings at the time of his death. It was suggested that she was at any rate only partially so dependent. I entirely deny that she can rightly be said to be only partially dependent on her husband, because by the alms of relatives she was supplied to some extent with the means of subsistence. She had no right to such alms, and they did not to any extent render her independent. Another point taken was that she was able to earn something herself. But the answer to that is that she would not have needed to earn anything, if the husband had lived, and had maintained her. The question is one of fact, and in my opinion the county court judge came to the right conclusion upon it. I agree with the comments made by the Master of the Rolls on the cases in Scotland, the last of which appears to be directly in the applicant's favour.

Appeal dismissed.

Solicitors for applicant: *Belfrage & Co., for J. M. Aynsley, Consett.*

Solicitors for employers: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1905
Nov. 7.

SPACEY *v.* DOWLAIS GAS AND COKE COMPANY, LIMITED.

Employer and Workman—Workmen's Compensation—Employment "on or in or about a Factory"—Gasworks—Gas Main in Street at a distance from Works—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman in the employ of a gas company was, in the course of his employment, engaged in making a trench in the roadway, under which one of their gas mains was laid, at a distance of a quarter of a mile from the works where the gas was manufactured, which works came within the definition of a "non-textile factory" given by the Factory and Workshop Act, 1901, s. 149, sub-s. 1 (*c*), when he was injured by an accident arising out of and in the course of his employment. The workman having claimed compensation under the Workmen's Compensation Act, 1897, the county court judge held that, at the time of the accident, he was employed "about a factory," inasmuch as the gas main was part of the gasworks, which were a factory, and accordingly awarded him compensation:—

Held, that the main was not part of a factory, and that the workman was not employed "about a factory" within the meaning of the Act, and therefore was not entitled to compensation.

APPEAL against an award of compensation under the Workmen's Compensation Act, 1897, by the judge of the county court at Merthyr Tydfil.

The applicant for compensation was a labourer in the employ of the Dowlais Gas and Coke Company, Limited, who were the owners of gasworks at Dowlais, and gas mains in the streets there for the distribution and supply of gas to consumers. While the applicant was, in the course of his employment, engaged in making a trench in a street, in which one of the gas company's mains was laid, in order to enable access to be had to the main for purposes of repair, a stone struck by his pick flew up and injured one of his eyes. The place where this accident happened was about a quarter of a mile from the gasworks, where the gas was manufactured. Steam power was used at those works in the process of the

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manufacture of gas, by reason of which the gasworks came within the definition of "non-textile factory" given in the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149, sub-s. 1 (*c*).

The applicant having claimed compensation in respect of his injury under the Workmen's Compensation Act, 1897, as having been employed "on or in or about a factory" when the accident happened, the county court judge held that he was so employed on the ground that the gas mains were part of a factory.

A. Parsons, for the employers. It is impossible to say that the gas main, near which the applicant was employed, was part of the gasworks, where the gas was manufactured. The county court judge does not appear to have found, nor could he reasonably have found, that the place where the accident happened was sufficiently near to the gasworks themselves to come within the term "about" as used in the Act. The mains have nothing to do with the manufacture of the gas. They are merely the means of delivering it when manufactured to consumers. In the nature of things gas cannot be delivered to consumers in carts like other manufactured articles, but the operation of delivery is not part of the manufacture; and the case is the same in principle as if a servant of a manufacturer of some other article met with an accident while engaged in delivering goods to a customer from a cart in a street a quarter of a mile away from the factory where they were manufactured. If the county court judge is right, then every lamplighter employed in lighting lamps at the remotest distance to which the company's mains are carried, and every gasfitter employed by them to put up or repair service apparatus in consumers' houses, is employed about a factory. The county court judge seems to have misapplied what was said by the present Master of the Rolls in *Fenn* v. *Miller*. (1)

F. T. R. Bigham, for the applicant. There is a great difference for this purpose between such undertakings as gas, electric

(1) [1900] 1 Q. B. 788, at p. 793.

lighting, and water undertakings, and factories in which ordinary commodities, such as boots or other portable articles, are manufactured. In the case of the latter, the delivery of the article is no doubt an operation distinct and severable from the process of manufacture. In the case of gas, the business of delivery cannot practically be severed from that of manufacture; the works are only of value as connected with the mains, and the whole forms one concern. It is not necessary to contend that the service pipes on private premises stand for this purpose on the same footing as the mains, which are an essential part of the entire system by which gas is produced ready for supply to customers. Even if the main cannot be said to be part of the gasworks, it is submitted that the applicant may be said to have been employed "about" a factory when the accident happened by reason of the connection of the place where it happened with the gasworks by a continuous line of pipes. If there was any evidence to support the finding of the county court judge, this Court cannot interfere with it. [He cited *Powell* v. *Brown* (1); *Atkinson* v. *Lumb*. (2)]

COLLINS M.R. This case seems to me to fall outside the utmost limits which could be assigned to the meaning of the words "on or in or about a factory" as used in the Workmen's Compensation Act, 1897. The learned county court judge, in arriving at the conclusion that this workman was employed "on or in or about a factory," appears to have mistaken or misapplied what was said by this Court in *Fenn* v. *Miller* (3) as to the meaning of these words. He has treated the applicant in this case as employed "on or in or about a factory" because he was engaged in labourer's work on a road in which a gas main belonging to the gas company, his employers, was laid. Underlying that finding is the assumption that the main itself is part of a factory. The only ground upon which the county court judge arrived at the conclusion

(1) [1899] 1 Q. B. 157. (2) [1903] 1 K. B. 861
(3) [1900] 1 Q. B. 788.

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Collins M.R.

that there was that physical contiguity to a factory which has been decided to be a necessary factor in these cases was the fact of the workman's propinquity to the main. The gasworks themselves were a quarter of a mile off, and the county court judge does not appear to suggest that he drew the inference that the workman was in physical contiguity to them. He appears to have arrived at his conclusion only by taking the main to be part of the factory. When we look to the definition of "factory" in the Factory Act, 1901, which is now applied to the Workmen's Compensation Act, 1897, it seems obvious that the conditions essential to bring a place within the definition of a factory in s. 149 (sub-s. 1) (*c*) of the Act of 1901 are exhausted, when the gas has been manufactured and leaves the gasworks to be supplied to consumers, and that the main, which is merely a way easily traversable by the gas, which travels along is without assistance, for the purpose of supply to consumers, is no part of the factory. By "factory" is intended a place where an article is produced. The business of delivering the article may be undertaken either by the producer or some one else; but it involves a new series of acts for enabling a customer to utilize the product which has been manufactured, and is a distinct operation from the manufacture of the article, which is completed before delivery through the main begins. It seems to me that we should be extending the signification of the word "factory" unduly, and beyond what is warranted by the decisions, if we were to make the area of the gasworks considered as a factory extend to the utmost point at which gas is delivered through the gas company's main. There is no middle point, and, if the view taken by the county court judge is right, it must extend to that distance. For these reasons it appears to me that he has arrived at his conclusion by a misdirection of himself in point of law, and therefore that this appeal must be allowed.

ROMER L.J. I agree. I do not think that this case can be brought within the Act on the ground that the workman was employed in physical proximity to the gasworks themselves.

So the case can only be held to come within the Act by holding that the mains supplying gas to customers were all part of the factory. All I can say is that in my opinion they cannot properly be said to be so. They are concerned, not with the manufacture of the gas, but with its supply to customers. No doubt as a matter of business it is convenient that the supply of the gas should be carried out by the company which manufactures it, but nevertheless the supply of it is an operation distinct from its manufacture. It must be remembered that the place where it is manufactured only comes within the Act because steam or other mechanical power is there used in its manufacture. That mechanical power has nothing to do with its supply through the mains.

MATHEW L.J. I am of the same opinion. In dealing with this Act we are to have recourse to the ordinary meaning of the words used in it. What would the ordinary man say, if asked the question, What is a gas factory? He would say that it was a place where gas is manufactured. The same company may carry on the two operations, one being the manufacture of gas and the other its distribution, when manufactured. But they are distinct, and conceivably might be carried on by different persons. I do not think that it would be reasonable to extend the meaning of the term "factory" in the way suggested by the applicant's counsel, so as to make it include the mains used for distribution. There is this further consideration. In the case of factories such as gasworks, where steam or such like mechanical power is employed, there are elements of danger present, which probably has led the Legislature to provide that the workmen employed on, in, or about such places should receive special protection. This workman was employed in the work of an ordinary labourer at a distance from the place where the gas was actually manufactured, and it could not be suggested that his employment was such as to entitle him to protection under the Act, except for the accidental circumstance that he was employed by a gas company. I cannot adopt the view that that accidental

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circumstance can convert his employment from one which is unprotected to one that is protected by the Act.

Appeal allowed.

Solicitor for applicant: *H. P. Becher, for F. D. Sydney Simons, Merythyr Tydfil.*

Solicitors for employers: *William Hurd & Son, for Gwilym James, Charles & Davies, Merthyr Tydfil.*

E. L.

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ADULTERATION — *Sample — Purchase for Analysis — Mode of dividing Sample — Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

Upon the hearing of an information under s.16 of the Sale of Food and Drugs Act, 1875, it appeared that the purchaser asked the seller, a grocer, if he sold cream of tartar, and the seller produced a box containing penny packets labelled cream of tartar. The purchaser asked for, and was supplied with, four packets from the box, all of which were similar in size, outward appearance, and label, and paid fourpence for them; he then emptied the contents of the four packets into one heap and divided the whole quantity into three parts and sealed them up, handing one part to the seller, another to the public analyst, and retaining the third himself:—

ADULTERATION—*continued.*

Held, that each packet was not a separate article for the purposes of the Act, and that the mode in which the contents of the packets were dealt with by the purchaser was a sufficient compliance with the requirements of s. 14 of the Act.

Mason v. *Cowdary*, [1900] 2 Q. B. 419, distinguished. SMITH *v.* SAVAGE - **Div. Ct. 88**

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ASSIGNMENT OF DEBT—*Chose in Action—Maintenance—Indirect Motive on part of Assignee—Trust in respect of Moneys recovered—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

The plaintiff took from creditors of the defendant an absolute assignment of their debts in consideration of a covenant by him that, if he should recover the amount of the debts from the defendant, he would pay over to them the amounts of their respective debts or so much thereof as he might be able to realize after payment of the costs necessarily incurred by him. Notice in writing of the assignment was given to the defendant. It appeared that the plaintiff and the defendant were co-directors of a company, and the plaintiff, being dissatisfied with the action of the defendant as director of the company, took the assignment with a view to procuring an adjudication of bankruptcy against the defendant, and so getting him removed from the directorate of the company:—

Held (by Collins M.R., Mathew L.J., and Cozens-Hardy L.J., the M.R. doubting), that the assignment of the debts was not invalid as savouring of maintenance or being otherwise against public policy.

Comfort v. *Betts*, [1891] 1 Q. B. 737, followed.
FITZROY *v.* CAVE - - - C. A. 364

ATTACHMENT—*Debts, Attachment of—Garnishee Order—Execution—Rights of Garnishor—Garnishee Company—Debenture-holder—Priorities—Rules of Supreme Court, Order* XLV.

A judgment creditor obtained and served upon a limited company a garnishee order absolute attaching debts due from them to the judgment debtor. The garnishees subsequently borrowed, bonâ fide, a sum of money from W. and issued to him a debenture, covering all their assets and property, to secure the repayment of the loan. Execution against the garnishees was then put in by the garnishor; and, the sheriff having seized goods of the garnishees, W. appointed a receiver and claimed the goods under his debenture. On an interpleader issue to try the right to the goods seized as between the garnishor and the debenture-holder:—

Held, that the garnishee order did not give the garnishor any legal or equitable right to the goods in priority to the debenture-holder, who was therefore entitled to succeed in the issue.
GEISSE *v.* TAYLOR AND HARTLAND. TAYLOR & HARTLAND, LIMITED, GARNISHEES. WESTON, CLAIMANT - - - - Div. Ct. 658

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BANKRUPTCY — *Adjudication — Annulment — Debts—Release—"Payment in full"—Cash payment—Jurisdiction—Discretion—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 35.

Sect. 35 of the Bankruptcy Act, 1883, which requires, as a condition precedent to the exercise of the jurisdiction to annul an adjudication in bankruptcy, proof "that the debts of the bankrupt are paid in full," is not satisfied by an unconditional release given to the bankrupt by his creditors. To satisfy the section the "debts"—including at least all debts which have been actually and properly proved in the bankruptcy—must have been fully paid in cash.

The bulk of a bankrupt's creditors who had proved their debts in the bankruptcy executed a deed releasing him absolutely, without any consideration, from his debts owing to them, and agreed to withdraw their proofs; the few remaining creditors he paid in full cash. He then applied, under s. 35 of the Bankruptcy Act, 1883, for the annulment of his adjudication on the ground that his debts had been "paid in full":—

Held (reversing the decision of the Divisional Court, Bigham and Darling JJ.), that there had been no "payment in full" within the meaning of the section.

Per Stirling L.J.: The jurisdiction conferred upon the Court by s. 35 to annul an adjudication is discretionary; and, in the absence of special circumstances, it would not be a good exercise of

BANKRUPTCY—*continued.*

that discretion to make an order for annulment where, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted.

In re E. A. B., [1902] 1 K. B. 457, and *In re Pilling*, [1903] 2 K. B. 50, distinguished. *In re* KEET - - - - - **C. A. 666**

2. —— *Bankruptcy Notice—Validity—"Final Judgment"—"In accordance with the Terms of the Judgment"—Judgment for Debt "and Costs to be taxed"—Bankruptcy Notice for Debt alone issued before Taxation of Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Rules of Supreme Court, Order* XLII., *r.* 18.

The plaintiff in an action in the King's Bench Division recovered judgment against the defendant for "1500*l.* and costs to be taxed." Before the costs had been taxed the creditor served on the debtor a bankruptcy notice claiming payment of the 1500*l.* alone:—

Held, that having regard to rule 18 of Order XLII. of the Rules of the Supreme Court, which entitles a creditor who has recovered judgment for a sum of money and costs to issue separate writs of execution for the sum of money and the costs, the notice was a valid notice under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883.

In re H. B., [1904] 1 K. B. 94, distinguished. *In re* G. J. *Ex parte* G. J. - - **C. A. 678**

3. —— *Contract for Works—Payment by Instalments on Engineer's Certificate—Specified Firms to supply Machinery—Power for Engineer, on Contractor unduly delaying Payment for Machinery, to order Direct Payment to Firms—Receiving Order against Contractor—Subsequent Order by Engineer for direct Payment to Firms—Priority—Title of Trustee—Secured Creditors—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 168.

In September, 1903, A. signed a contract with a local authority to construct sewage works at a price to be paid to him by monthly instalments, less 10 per cent., on the certificate of the engineer of the local authority; the 10 per cent. to be retained and paid to A. six months after completion of the works. The contract also provided that certain machinery for the works was to be supplied to A. by specified firms, and that (clause 54), "If the engineer shall have reasonable cause to believe that the contractor is unduly delaying proper payment to the firms supplying the machinery, he shall have power if he thinks fit to order direct payment to them."

On October 12, 1904, A. was adjudicated bankrupt on his own petition. At this date the contract was substantially completed, and there was then due under it the sum of 1574*l.* 15*s.* 10*d.* only, of which 1349*l.* 17*s.* 8*d.* was retention money and 224*l.* 18*s.* 2*d.* was a sum payable on the engineer's next certificate, and these two sums were claimed by the trustee in bankruptcy. At the same date A. owed 836*l.* 8*s.* 9*d.* in various amounts to the specified firms for machinery supplied to him for the works; and subsequently the engineer in 1905 made two orders under clause 54 directing payment of the 836*l.* 8*s.* 9*d.* out of the 1574*l.* 15*s.* 10*d.* to the firms in settlement of their accounts:—

Held, that A. by presenting his own petition in bankruptcy "unduly delayed proper payment" to the machinery firms within the meaning of clause 54:

Held, also, that the power conferred by that clause on the engineer was not annulled or revoked by A.'s bankruptcy; and that the firms by virtue of the two orders of the engineer were entitled to be paid the 836*l.* 8*s.* 9*d.* out of the 1574*l.* 15*s.* 10*d.* in priority to the claim of the trustee. *In re* WILKINSON. *Ex parte* FOWLER **Bigham J. 713**

4. —— *Deed of Assignment for Benefit of Creditors—Effect of Payment to Trustee under Deed—Act of Bankruptcy—Relation back of Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 49.

Payment, with full knowledge, to the trustee under a deed of assignment for the benefit of creditors is not a protected transaction, where, within three months of the execution of the deed, a receiving order is made against the grantor. DAVIS *v.* PETRIE - - - **Div. Ct. 528**

5. —— *Mortgage of Chose in Action after commencement of Bankruptcy—Assignment—Bona fides—Protected Transaction—Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

After the presentation of a bankruptcy petition against debtors on which a receiving order was made, the debtors, before the date of the receiving order, assigned a sum of money payable to them to one of their creditors to secure a debt due by them to him, and he took the assignment in good faith and without notice of any act of bankruptcy committed by the debtors:—

Held, that the assignment was protected by s. 49 of the Bankruptcy Act, and was good as against the trustee in bankruptcy.

In re Badham, (1893) 10 Morr. 252, distinguished. *In re* DUNKLEY & SON. *Ex parte* WALLER - - - - **Bigham J. 683**

6. —— *Proof—Principal and Surety—Mortgage of Policy of Insurance—Covenant to pay Interest and Premiums—Indemnity of Surety by Principal—Bankruptcy of Principal—Proof of Surety for estimated Amount of Liability to pay future Interest and Premiums—Double Proof.*

By an indenture of mortgage the mortgagor assigned to the mortgagee a policy of insurance on the mortgagor's life to secure the repayment of an advance of 500*l.* which the mortgagor covenanted to repay on a certain date, and the mortgagor and another person as surety jointly and severally covenanted with the mortgagee to pay interest so long after the said date as any principal money remained due, and to pay all premiums on the policy, and, if the policy should become void, the cost of effecting a new policy. The mortgagor subsequently agreed to indemnify the surety against any sums which he might be called upon to pay under his covenants with the mortgagee. No part of the principal money was repaid, and the mortgagor became bankrupt. The mortgagee proved in the bankruptcy for the principal money less an amount at which he valued the policy. The surety claimed, under the agreement to indemnify, to prove for the

BANKRUPTCY—*continued.*
estimated amount of his liability to the mortgagee for future interest and premiums:—
Held, that the surety was not entitled to prove under either head. *In re* Moss. *Ex parte* HALLET - - - - - Div. Ct. 307

7. —— *Traders — Bank Loan to purchase Goods—Letter of Lien on Goods—Construction—"Transfer of Goods in the ordinary course of Business"—"Documents used in the ordinary course of Business as Proof of the Possession or Control of Goods"—Secured Creditors—Bill of Sale—Attornment—Reputed Ownership—Order and Disposition—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1890 (53 & 54 *Vict. c.* 53)—*Bills of Sale Act*, 1891 (54 & 55 *Vict. c.* 35)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

Bankers from time to time made advances to traders to enable them to purchase goods for shipment to the East. The course of business was for the traders to send the goods to bleachers to be bleached, and afterwards they were returned to the traders or sent to packers to be packed for shipment; and on the occasion of each advance the traders sent the bank a letter of lien accompanied by the bleachers' receipts for the goods. The letter, which was in printed form, was in these terms: "We beg to advise having drawn a cheque on you for £——, which amount please place to the debit of our loan account, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the under-mentioned goods in the hands of [here followed list of goods and names of bleachers] as per their receipt inclosed. These goods when ready will be shipped to Calcutta, and the bills of lading duly indorsed will be handed to you, and we then undertake to repay the above advance . . . ." On the bankruptcy of the traders:—
Held, by the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.), that the letters of lien were not void as being bills of sale not in the prescribed form and unregistered under the Bills of Sale Acts, but were (Stirling L.J. doubting) "documents used in the ordinary course of business as proof of the possession or control of goods," within the exceptions in s. 4 of the Bills of Sale Act, 1878:
Held, also, that the case was not affected by either of the Bills of Sale Acts, 1890 and 1891.
A few days before the commencement of the bankruptcy the bank gave notice to the bleachers whose receipts they held, claiming all the goods specified in such receipts, and on the same day also gave notice to the traders claiming the goods held by bleachers against which the bank had outstanding advances made to the traders Bleachers holding for the traders goods not covered by any letters of lien then, at the request of the traders, attorned to the bank before the commencement of the bankruptcy, except in one case in which the attornment was made subsequently:—
Held, by the Court of Appeal, that none of the goods either specified in the receipts or in respect of which attornment had been made before the commencement of the bankruptcy were, "at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupts" as "the reputed owners thereof" within the meaning of s. 44 of the Bankruptcy Act, 1883; but without prejudice to the question whether the dealings before the bankruptcy with the goods not covered by any letters of lien could be impeached on the ground of fraudulent preference.
Ex parte North Western Bank, In re Slee, (1872) L. R. 15 Eq. 69, and *Merchant Banking Company of London, Ld.* v. *Spotten*, (1877) Ir. Rep. 11 Eq. 586, considered.
Decision of Bigham J. sub nom. *In re Young, Hamilton & Co., Ex parte Carter*, [1905] 2 K. B. 381, affirmed.
Whether the letters of lien were "transfers of goods in the ordinary course of a trade or calling" within the exceptions in s. 4 of the Bills of Sale Act, 1878, *quære*. *In re* HAMILTON YOUNG & Co. *Ex parte* CARTER - C. A. 772

8. —— *"Trustee"—Onerous Property—Leaseholds—Disclaimer, Time for—"First Appointment of Trustee"—Creditor's Trustee—Official Receiver as Trustee — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 21, *sub-ss.* 1, 4, 6; *s.* 54, *sub-s.* 1; *s.* 55, *sub-s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.
The words "after the first appointment of a trustee" in s. 55, sub-s. 1, of the Bankruptcy Act, 1883—which, as amended by s. 13 of the Bankruptcy Act, 1890, empowers "the trustee . . . . at any time within twelve months after the first appointment of a trustee" to disclaim any onerous property of the bankrupt—refer to an appointment of a trustee under s. 21, either by the creditors (sub-s. 1) or by the Board of Trade (sub-s. 6), and not to the official receiver's becoming, under s. 54, sub-s. 1, "the trustee" immediately upon adjudication and until such appointment. Therefore, the time for disclaimer by a trustee appointed under s. 21 runs from the date of the certificate of his appointment (sub-s. 4), and not from the date of the adjudication.
The official receiver, however, in becoming, under s. 54, sub-s. 1, "the trustee" immediately upon adjudication and until a trustee is appointed, may exercise the power of disclaimer given by s. 55, sub-s. 1, as amended, to "the trustee," though without being subject to the limitation of time for the exercise of that power; for this limitation runs, in terms, from a date which has no relation to the trusteeship of the official receiver, because he is never "appointed"; but, nevertheless, under sub-s. 4 of s. 55, he may be required by any person interested in the bankrupt's onerous property to decide whether he will disclaim or not.
In re Parker, (1885) 15 Q. B. D. 196, and *Turquand* v. *Board of Trade*, (1886) 11 App. Cas. 286, considered. *In re* COHEN - C. A. 704

BILL OF LADING—Charterparty—Arbitration clause—Cesser clause—Claim for demurrage at port of loading - - 791
See SHIPPING. 1.

BILL OF LADING—*continued.*
—— Shipowner's lien for unpaid hire—Withdrawal of ship—Payment of hire 92
See SHIPPING. 3.

BILL OF SALE—Traders—Bank loan to purchase goods—Letter of lien on goods—Reputed ownership - - - - 772
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BOARDING-HOUSE KEEPER—Goods of guest—Theft by inmate - - - 805
See NEGLIGENCE.

BOROUGH—Creation of county borough—Loss of borough's contribution to county expenses—Adjustment of financial relations 340
See LOCAL GOVERNMENT. 1.

BRISTOL CHANNEL PILOTAGE ACT—Vessel employed in coaling ships of navy—King's ship—Pilotage dues—Liability of master - - - - 723
See SHIPPING. 5.

BROKAGE—Marriage brokage—Contract—Illegality—Introductions with a view to marriage - - - - 123
See MARRIAGE.

BUILDINGS—"Structure"—Projection beyond general line of buildings - - 695
See LONDON.

BURIAL—*Burial Authority—Cemetery—Rights of Incumbent of Parish—Burial Fees—Interment of Nonconformist without Rites of Church of England—Consecration of part of Cemetery—Absence of Sanction of Secretary of State to Consecration—Burial Act*, 1852 (15 & 16 *Vict. c.* 85), *s.* 32—*Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *s.* 7—*Burial Act*, 1900 (63 & 64 *Vict. c.* 15), *s.* 3.

A burial authority which had acquired land for a new cemetery petitioned the Secretary of State, under s. 7 of the Burial Act, 1853, for his sanction to the division of the ground into four approximately equal parts, of which one part (called plot A) was to be consecrated; the sanction was duly given. Subsequently a petition was presented on behalf of the burial board to the bishop of the diocese, praying for the consecration of plots A and C; the latter was apparently inserted in error. Both plots were duly consecrated, all the legal requirements and formalities as to the consecration being complied with. In 1904 two burials took place in plot C of two Nonconformist residents, who were buried with the rites of the respective communities to which they belonged, and without any of the rites and ceremonies of the Church of England; no services were rendered by the vicar of the parish or by any one on his behalf in respect of these burials. The vicar having sued the burial authority to recover a fee of 2*s.* 6*d.* in respect of each of these burials:—

Held, first, that plot C, having once been consecrated with the proper legal formalities, remained consecrated ground, notwithstanding the want of the sanction of the Secretary of State to its consecration; but, secondly, that the vicar, having rendered no services in respect of the burials, was not entitled under s. 3, sub-s. 4, of

BURIAL—*continued.*
the Burial Act, 1900, to any fees in respect of them. WILLIAMS *v.* BRITON FERRY BURIAL BOARD - - - - Div. Ct. 565

2. —— *Burial Ground—Addition to—Land set apart for Interments in Breach of Order in Council—Disused Burial Ground—Power to build on—Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *ss.* 1, 5, 6—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 4, *and Schedule.*

The provisions of ss. 1 and 6 of the Burial Act, 1853, apply to an addition to an existing burial ground as well as to an altogether new burial ground.

Where a piece of land was set apart for the purposes of interment, and part of it was used for those purposes, in contravention of an Order in Council made under s. 1 of the Burial Act, 1853:—

Held, that the definition of a "burial ground" in s. 4 of the Open Spaces Act, 1887, which is by that Act rendered applicable to the Disused Burial Grounds Act, 1884, included land which had been "set apart for the purposes of interment," even though it was so set apart in contravention of the Order in Council, and consequently could never have been lawfully used for the purposes of interment; and therefore that s. 3 of the last-mentioned Act prohibited the use of any part of the land so set apart for building purposes.

Judgments of Wright J. and Bray J., [1905] 1 K. B. 403, affirmed. *In re* BOSWORTH AND GRAVESEND CORPORATION - - C. A. 426

CAPTURE—Termination of voyage by—Seaman—Right to wages - - - 315
See SHIPPING. 4.

CAR—Motor-car.
See under MOTOR CAR.

CARRIAGE.
See under CARRIER.

CARRIAGE OF GOODS—Rates and charges—Intent to avoid payment of "tolls" 113
See RAILWAY. 1.

CARRIER—*Railway Company—Owner's Risk Note—Mode of Packing likely to cause Injury—Notice to Company—Wilful Misconduct.*

A parcel of sheepskins which had been delivered by the plaintiff to the defendants for carriage from Paddington to Winchester arrived at their destination in a damaged condition owing to their having been packed in a truck with wood chips, which had become entangled in the wool. The plaintiff wrote to the station-master at Winchester complaining of the damage, and asking him to communicate with the authorities at Paddington to prevent a recurrence of the injury, as further consignments of sheepskins were expected to be sent off from thence shortly. He received a reply saying, "I have asked our Paddington people not to use the kind of litter you object to in the future." Subsequently, the plaintiff sent a

CARRIER—*continued.*

second parcel of sheepskins from Paddington to Winchester on the terms of an "owner's risk" note, whereby he relieved the defendants from liability for damage except upon proof that it arose from wilful misconduct on the part of the defendants' servants. This parcel, like the first, arrived damaged from being put into trucks containing wood chips. In an action to recover for the damage to the second parcel:—

Held, that, in the absence of proof that the persons who actually loaded the goods in the trucks or who superintended their loading had notice that the mode of packing employed was likely to be injurious to the goods, there was no evidence of wilful misconduct on the part of the defendants' servants; the mere fact that some other official of the defendants had that notice was not sufficient. FORDER *v.* GREAT WESTERN RAILWAY COMPANY - - **Div. Ct. 532**

—— Carriage of coal in traders' trucks—Delay in transit—Demurrage - - **437**
See RAILWAY. 2.

CASES:—

—— *Attack* v. *Bramwell* (1863) 3 B. & S. 520
Considered by Div. Ct. GRUNNELL *v.* WELCH - - **[1905] 2 K. B. 650**

—— *Attorney-General* v. *London County Council*, [1904] 2 K. B. 635.
Affirmed by C. A. **[1905] 2 K. B. 375**

—— *Attorney-General* v. *Scott*, [1904] 1 K. B. 404, 407.
Referred to by C. A. ATTORNEY-GENERAL *v.* SCOTT
[1905] 2 K. B. 160, 170

—— *Badham, In re* - (1893) 10 Morr. 252
Distinguished by Bigham J. *In re* DUNKLEY & SON - **[1905] 2 K. B. 683**

—— *Bagge* v. *Mawby* - (1853) 8 Ex. 641
Considered by Div. Ct. GRUNNELL *v.* WELCH - - **[1905] 2 K. B. 650**

—— *Barnett* v. *Guildford (Earl)*, (1855) 11 Ex. 19.
Approved and applied by C. A. OCEAN ACCIDENT AND GUARANTEE CORPORATION, LD. *v.* ILFORD GAS CO.
[1905] 2 K. B. 493

—— *Blackmore* v. *White* - [1899] 1 Q. B. 293
Distinguished by Bigham J. GALBRAITH *v.* POYNTON **[1905] 2 K. B. 258**

—— *Borthwick* v. *Elderslie Steamship Co.*, [1904] 1 K. B. 319; [1905] A. C. 93.
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—— *Bosworth and Gravesend Corporation, In re*, [1905] 1 K. B. 403.
Affirmed by C. A. **[1905] 2 K. B. 426**

—— *Bryce* v. *Ehrmann* (1904) 42 Sc. L. R. 23
Distinguished by Bray J. WEINER *v.* GILL - - **[1905] 2 K. B. 172**

—— *Coburg Hotel* v. *London County Council*, (1889) 81 L. T. 450.
Referred to by Div. Ct. LONDON COUNTY COUNCIL *v.* SCHEWZIK
[1905] 2 K. B. 695, 698, 701

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—— *Comfort* v. *Betts* - [1891] 1 Q. B. 737
Followed by C. A. FITZROY *v.* CAVE
[1905] 2 K. B. 364

—— *Dansey* v. *Richardson* (1854) 3 E. & B. 144
Followed by C. A. SCARBOROUGH *v.* COSGROVE - - **[1905] 2 K. B. 805**

—— *E. A. B., In re* - [1902] 1 K. B. 457
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[1905] 2 K. B. 666

—— *H. B., In re* - - [1904] 1 K. B. 94
Distinguished by C. A. *In re* G. J.
[1905] 2 K. B. 678

—— *Hamilton Young & Co., In re. Ex parte Carter*, [1905] 2 K. B. 381.
Affirmed by C. A. **[1905] 2 K. B. 772**

—— *Henderson* v. *Underwriting and Agency Association*, [1891] 1 Q. B. 557.
Questioned by C. A. HARDING *v.* BUSSELL - - **[1905] 2 K. B. 83**

—— *Hermann* v. *Charlesworth* [1905] 1 K. B. 24
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—— *Holder* v. *Soulby* (1860) 8 C. B. (N.S.) 254
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—— *Hull* v. *London County Council*, [1901] 1 K. B. 580.
Followed by Div. Ct. LONDON COUNTY COUNCIL *v.* SCHEWZIK
[1905] 2 K. B. 695

—— *Imperial and Grand Hotels Co.* v. *Christchurch Guardians*, [1905] 1 K. B. 89.
Affirmed by C. A. **[1905] 2 K. B. 239**

—— *Ingram* v. *Barnes*, (1857) 7 E. & B. 115, 132.
Followed by Div. Ct. SQUIRE *v.* MIDLAND LACE CO. - **[1905] 2 K. B. 448**

—— *Jackson* v. *Wimbledon Urban District Council*, [1904] 2 K. B. 359.
Affirmed by C. A. - **[1905] 2 K. B. 27**

—— *Logsdon* v. *Booth* - [1900] 1 Q. B. 401
Followed by Div. Ct. GILBERT *v.* JONES
[1905] 2 K. B. 691

—— *Logsdon* v. *Trotter* - [1900] 1 Q. B. 617
Followed by Div. Ct. GILBERT *v.* JONES
[1905] 2 K. B. 691

—— *London County Council* v. *Illuminated Advertisements Co.*, [1904] 2 K. B. 886.
Referred to by Div. Ct. LONDON COUNTY COUNCIL *v.* SCHEWZIK
[1905] 2 K. B. 695, 698, 701

—— *Marquand* v. *Banner* (1856) 6 E. & B. 232
Distinguished by WEHNER *v.* DENE STEAM SHIPPING CO. **[1905] 2 K. B. 92**

—— *Mason* v. *Covdary* - [1900] 2 Q. B. 419
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—— *Merchant Banking Company of London, Ld.* v. *Spotten*, (1877) Ir. Rep. 11 Eq. 586.
Considered by C. A. *In re* HAMILTON YOUNG & CO. - **[1905] 2 K. B. 772**

—— *Morel Brothers* v. *Westmoreland (Earl of)* [1904] A. C. 11.
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—— *North Western Bank, Ex parte. In re Slee,* (1872) L. R. 15 Eq. 69.
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—— *Page* v. *Vallis* (1903) 19 Times L. R. 393
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—— *Palmer* v. *Hutchinson,* (1881) 6 App. Cas. 619.
Referred to by Div. Ct. SYMONS *v.* BAKER - [1905] 2 K. B. 723, 729

—— *Parker, In re* - (1885) 15 Q. B. D. 196
Considered by C. A. *In re* COHEN [1905] 2 K. B. 704

—— *Parker* v. *London County Council,* [1904] 2 K. B. 501.
Followed by C. A. LYLES *v.* SOUTHEND-ON-SEA CORPORATION [1905] 2 K. B. 1

—— *Pillar* v. *Llynvi Coal Co.,* (1869) L. R. 4 C. P. 752; 38 L. J. (C.P.) 294.
Followed by Div. Ct. SQUIRE *v.* MIDLAND LACE Co. - [1905] 2 K. B. 448

—— *Pilling, In re* - - [1903] 2 K. B. 50
Distinguished by C. A. *In re* KEET [1905] 2 K. B. 666

—— *Pletts* v. *Beattie* - [1896] 1 Q. B. 519
Distinguished by Div. Ct. NOBLETT *v.* HOPKINSON - [1905] 2 K. B. 214

—— *Runciman & Co.* v. *Smyth & Co.,* (1904) 20 Times L. R. 625.
Overruled by C. A. TEMPERLEY STEAM SHIPPING Co. *v.* SMYTH & Co. [1905] 2 K. B. 791

—— *Secretary of State in Council of India* v. *Scoble,* [1903] A. C. 299.
Followed by C. A. EAST INDIA RY. Co. *v.* SECRETARY OF STATE IN COUNCIL OF INDIA - - [1905] 2 K. B. 413

—— *Turquand* v. *Board of Trade,* (1886) 11 App. Cas. 286.
Considered by C. A. *In re* COHEN [1905] 2 K. B. 704

—— *West Ham Union* v. *Holbeach Union,* [1903] 2 K. B. 627; [1904] 2 K. B. 121.
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—— *Ydun, The* - - - [1899] P. 236
Followed by C. A. LYLES *v.* SOUTHEND-ON-SEA CORPORATION [1905] 2 K. B. 1

—— *Yeoman* v. *Rex* - [1904] 2 K. B. 429
Distinguished by Channell J. HOULDER *v.* WEIR - - [1905] 2 K. B. 267

—— *Young Hamilton & Co., In re. Ex parte Carter,* [1905] 2 K. B. 381.
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CONSECRATION—Absence of sanction of Secretary of State to—Burial authority—Rights of incumbent of parish - 565
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CONSPIRACY—Indictment—Obtaining a passport by false representations—Direction to jury—Acts tending to produce a public mischief - - - 730
See CRIMINAL LAW. 2.

CONTRACT—*Illegality—Probate Action—Contract by Parties that Costs shall be paid out of the Estate—Infant Co-contractor.*

The plaintiff in a probate action sought to establish the validity of a will as residuary legatee, and H., one of the defendants, as an executor and the trustee of an infant beneficiary under a will of the testator earlier in date, sought to establish the validity of that will. During the course of the proceedings in the action a contract was made between the plaintiff of the one part and H. and the infant, who was also a defendant, of the other part, whereby it was agreed that, whichever of the two wills was upheld by the Court, the costs of the plaintiff and of the defendant H. and the infant should be paid out of the estate whether the Court so ordered or not. The Court pronounced in favour of the earlier will, and on application made refused to sanction the contract on behalf of the infant, and directed that the plaintiff should pay the costs of H. and the infant in the probate action.

In an action by the plaintiff to recover his costs against the defendant H. under the contract:—

Held, that the contract was not illegal, and that the defendant was personally liable upon it. PRINCE *v.* HAWORTH - - Lawrance J. 768

—— Bankruptcy—Contract for works—Receiving order against contractor—Priority—Title of trustee—Secured creditors
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—— Illegality—Marriage brokage—Introductions with a view to marriage - 123
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—— Sale of goods—Contract for delivery of goods by instalments—Wrongful repudiation of contract by buyer - 543
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—— Distress for poor-rate—Jurisdiction—Reasonable charges for taking, keeping, and selling—Action to recover excess
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—— Judgment for debt "and costs to be taxed"—Bankruptcy notice for debt alone issued before taxation of costs - 678
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COUNTY—Creation of county borough—Loss of borough's contribution to county expenses—Adjustment of financial relations - - - - - 349
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COUNTY COURT—*Execution—Seizure and Sale of Goods not the Property of Judgment Debtor—Claim made by Owner after Sale—Liability of High Bailiff to Owner.*

Furniture was let for hire with an option to purchase under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring and retake possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county court, and, no claim having been made to it, was appraised and sold under the execution and the proceeds paid into court, and the furniture delivered to the purchaser. On the day after the sale the owners heard for the first time of the seizure and sale of the furniture, and gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, and in the course of the interpleader proceedings the execution creditor admitted the title of the claimants, who gave a notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling it:—

Held, that, as under the hiring agreement the claimants had a right to its possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them. JELKS *v.* HAYWARD. (HACKNEY FURNISHING COMPANY, CLAIMANTS)
Div. Ct. 460

2. —— *Jurisdiction—Distress for Poor-rate—Reasonable Charges for taking, keeping, and selling—Action to recover Excess—Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *ss.* 2, 4—*Distress (Costs) Act*, 1827 (7 *& 8 Geo.* 4, *c.* 17)—*Distress for Rates Act*, 1849 (12 *& 13 Vict. c.* 14), *s.* 1.

Where a bailiff in distraining for a poor-rate has retained out of the amount realized by the sale of the distress an unreasonable charge for the taking, keeping, and selling of the distress, the remedy of the person aggrieved is not confined to an application to justices for an order under s. 2 of the Distress (Costs) Act, 1817. The county court has jurisdiction to try an action in which repayment is claimed of so much of the charge as is unreasonable. THE KING *v.* JUDGE PHILBRICK AND MOREY. *Ex parte* EDWARDS
Div. Ct. 108

COUNTY COURT—*continued.*

3. —— *Practice—Remitted Action — Discretion of Judge as to Costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113.

Sect. 65 of the County Courts Act, 1888, which provides that in the case of remitted actions "the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts," does not take away the general discretionary power of the judge over the costs. EVERALL *v.* BROWN - - Div. Ct. 196

CREDITOR—Bankruptcy.
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—— Deed of assignment for benefit of creditors —Effect of payment to trustee under deed—Act of bankruptcy - 528
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—— International law—Annexation—Creditor's rights against conqueror - - 391
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CRIMINAL LAW—*Carnally knowing Girl above Thirteen and under Sixteen—Limitation of Time for taking Proceedings — Extension of Time — Retrospective Effect of Statute — Procedure — Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 5—*Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 27.

The prisoner was convicted, under s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885, of an offence committed on July 15, 1904. The prosecution was not commenced until December 27, more than three months but less than six months after the commission of the offence. On October 1 the Prevention of Cruelty to Children Act, 1904, came into operation, by s. 27 of which the time for commencing a prosecution for an offence under s. 5, sub-s. 1, of the earlier Act was extended from three months to six months:—

Held, that s. 27 related to procedure only, and was therefore retrospective, and that the conviction must be upheld. THE KING *v.* CHANDRA DHARMA. THE KING *v.* HUTCHINSON. THE KING *v.* SLATER. THE KING *v.* COURT C. C. R. 335

2. —— *Conspiracy—Indictment — Obtaining a Passport by False Representations—Direction to Jury—Matter of Law—Acts tending to produce a Public Mischief.*

An indictment against two defendants for conspiracy alleged that the defendants unlawfully conspired to obtain a passport in the name of one of the defendants from the Foreign Secretary by falsely pretending and representing that the said defendant desired to use the passport himself while travelling in Russia with intent that the passport should be used by another person in the name of the said defendant, and that the defendants in pursuance of the conspiracy sent the passport to the other person for use by him in Russia, in fraud of the Foreign Office regulations for the issue of passports, to the injury and prejudice and disturbance of the lawful, free, and customary intercourse between the subjects of the King and those of the Czar of Russia, to the public mischief of the subjects of the King, and to the endangerment of the continuance of the peaceful relations between the King and the Czar and their subjects respectively:—

Held, that the indictment was good.

At the trial of the indictment evidence was given on behalf of the Crown that the defendants combined and conspired together to obtain, and did in fact obtain, from the Foreign Office by false and fraudulent pretences and representations a passport in the name of the defendant McCulloch for his use in Russia with the intent that it should be used in Russia by some other person, and that in fact it was so used with their knowledge and consent. The judge directed the jury as matter of law that those acts, if proved, tended to produce a public mischief, and that the defendants had committed the offence charged in the indictment:—

Held, that this direction was right. THE KING *v.* BRAILSFORD - - Div. Ct. 730

3. —— *Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24), *s* 1—*Omission of Material Particulars — Jurisdiction — Offence partly committed Abroad.*

The defendant was employed by a firm, carrying on business in London, to manage their branch establishment in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, and to transmit these slips to them in London in order that the amounts might be entered up in a cash-book kept in London. On a certain date the defendant received three sums in Paris which he fraudulently appropriated to his own use, and omitted to enter the receipt thereof on the slips sent by him on that day to London, knowing and intending that the same would in consequence be omitted from the cash-book, as was the case. The defendant was indicted at the Central Criminal Court under s. 1 of the Falsification of Accounts Act, 1875, for omitting, or concurring in omitting, material particulars from the cash-book, and convicted:—

Held, that the Court had jurisdiction to try the case, and that the defendant was rightly convicted. THE KING *v.* OLIPHANT C. C. R. 67

4. —— *Fisheries—Poisoning Fish in Salmon River—Construction of Statutes—Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 32—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 13.

Although s. 32 of the Malicious Injuries to Property Act, 1861, as amended by s. 13 of the Salmon Fishery Act, 1873, cannot be construed grammatically, the intention of the Legislature is plain, and the section as amended must be construed as making it a misdemeanour punishable with penal servitude for any term not exceeding seven years unlawfully and maliciously to put any lime or other noxious material in any salmon river with intent thereby to destroy the fish. THE KING *v.* VASEY AND LALLY C. C. R. 748

5. —— *Indictment for Offence after previous Conviction — Arraignment — Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 116—*Error.*

Sect. 116 of the Larceny Act, 1861, provides that "In any indictment for any offence punish-

CRIMINAL LAW—*continued.*
able under this Act and committed after a previous conviction" the offence may be charged in the manner therein specified; and the section then goes on to say that "the proceedings upon any indictment for committing any offence after a previous conviction . . . . shall be as follows":—

Held, that the words "for committing any offence" in the latter paragraph are perfectly general and not limited to offences punishable under that Act.

A prisoner was indicted at quarter sessions for attempting to commit larceny, and a subsequent count in the indictment charged a previous conviction. The prisoner was arraigned upon and pleaded to both counts. Objection was taken on his behalf to the arraignment as contravening the provisions of s. 116 of the Larceny Act, 1861, which require that upon an indictment for an offence after a previous conviction the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and that until he be found guilty of that offence he shall not be called upon to plead to the charge of the previous conviction. The recorder accordingly adjourned the trial to the next sessions. At that sessions the prisoner was tried. There was no fresh arraignment, but his former pleas were treated as standing. He was, however, given in charge to the jury upon the first count only, and was found guilty and sentenced on that count:—

Held, that although the arraignment did not take place at the sessions at which the prisoner was tried, and although the fact of the previous conviction was not disclosed to the jury by whom he was convicted, either by the manner of giving him into their charge or otherwise, the fact that the arraignment did not comply with the provisions of the section was such a substantial defect as could not be cured by verdict, and that the conviction must be quashed. FAULKNER *v.* THE KING - - - - **Div. Ct. 76**

6. —— *Larceny—Pretended Purchase—Passing of Property.*

The prisoner was in the habit of buying from time to time from a manufacturing company portions of the accumulated ashes of the company's works. The only agreement made between the managing director of the company and the prisoner with respect to such purchases was as to the price per ton, the prisoner being at liberty to take from the accumulation as much as he required, upon the understanding that the amount of his purchase in each case should be determined by the weight as ascertained by the company's weigher. It was the duty of the company's weigher to enter in a book a record of the weights of the ashes purchased to enable the company to charge the purchasers with the proper amounts. The company's weigher fraudulently and in collusion with the prisoner weighed and delivered to the prisoner 32 tons 13 cwt. of the ashes and entered the weight in the book as being 31 tons 3 cwt. only:—

Held, that on these facts the prisoner was rightly indicted for larceny of 1 ton 10 cwt. THE KING *v.* TIDESWELL - - **C. C. R. 273**

CROWN — *Prerogative — Chattels belonging to Crown—Distress for Rent—Privilege—Landlord and Tenant.*

The chattels of the Crown on land occupied by a subject are privileged from distress for rent. SECRETARY OF STATE FOR WAR *v.* WYNNE **Div. Ct. 845**

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGE AND DAMAGES—Copyhold—Breach of obligation of copyholder to repair—Forfeiture - - - - **258**
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—— Limitation of time for bringing action—Tramway worked by municipal authority—Injury to passenger - - **1**
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—— Unfurnished house—Defective premises—Promise by landlord to repair—Accident arising from defect - - **757**
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DISCLAIMER—"Trustee"—Leaseholds—Disclaimer, Time for—Creditors' trustee—Official receiver as trustee - 704
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DISCOVERY—Affidavit of ship's papers—Partial land transit - - - - 83
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—— Interrogatory—Defamation—Interrogatory not administered bonâ fide for purposes of action - - - - 523
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DISCRETION—Bankruptcy—Annulment—Jurisdiction - - - - 666
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—— County court—Remitted action—Discretion of judge as to costs - - 196
See COUNTY COURT. 3.

DISEASE—Workmen's compensation—Lead-poisoning—Gradual accumulation of lead in system - - - 232
See EMPLOYER AND WORKMAN. 5.

DISEASES OF ANIMALS—*Inspector appointed by Local Authority—Detention of Sheep by Inspector on suspicion of Sheep-scab—Negligence of Inspector—Liability of Local Authority—Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *ss.* 2, 35—*Sheep-Scab Order*, 1898—*Local Government.*

Local authorities are not liable for the negligence of an inspector appointed by them under the Diseases of Animals Act, 1894, where the alleged negligence is in respect of his having, whilst acting under the provisions of the Sheep-Scab Order, 1898, seized and detained in a market sheep suspected of sheep-scab. STANBURY *v.* EXETER CORPORATION - Div. Ct. 838

DISOBEDIENCE—Pauper—Disobedience to lawful order—"Misbehaviour" - 200
See POOR LAW. 1.

DISTRESS—*Landlord and Tenant—Distraint on Goods of Lodger—Illegal Distress—Liability of Bailiff to Action—Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79), *s.* 2.

An action will lie against a bailiff for an illegal distress under s. 2 of the Lodgers' Goods Protection Act, 1871.

Page v. Vallis, (1903) 19 Times L. R. 393, overruled. LOWE *v.* DORLING & SON Div. Ct. 501

—— Crown—Prerogative—Chattels belonging to Crown—Distress for rent—Privilege—Landlord and tenant - - 845
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DISTURBANCE—Ferry from vill to vill—Change of circumstances—New traffic - 287
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DIVIDED PARISHES AND POOR LAW.
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DOCK—Dock dues—Right to detain vessel until dues paid—Maritime lien for crew's wages—Priority - - - 817
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See under SEWERS.

DUTY—Estate duty.
See under REVENUE.

ECCLESIASTICAL LAW—*Service of the Rite of Ordination of Priests—"Impediment or Notable Crime"—Objections to Candidate for Ordination—Allegation of Ritualistic Practices.*

At the celebration of a service of the rite of ordination of priests, the appellant, a layman, came forth and objected that one of the deacons presenting himself for ordination had taken part in the services in a church in which adoration of the elements and other breaches of the prescribed ritual had taken place:—

Held, that the matters alleged against the deacon did not, if true, constitute an impediment or notable crime within the meaning of the words in the Ordination Service, to be said by the bishop, which call upon any person present, who knows any "impediment or notable crime" in any of the persons presenting themselves for ordination, to come forth and shew what "the crime or impediment" is. KENSIT *v.* ST. PAUL'S (DEAN AND CHAPTER) - - Div. Ct. 249

ELECTION—Goods supplied on order of wife—Judgment against wife for part of entire price—Election not to sue husband for balance - - - - - 580
See HUSBAND AND WIFE. 2.

ELECTRIC LIGHT—*Nuisance—Statutory Powers—Electric Supply—Leakage of Electricity—Fusion of Electric Main—Explosion—Fire—Electric Lighting Acts*, 1862, 1888 (45 & 46 *Vict. c.* 56; 51 & 52 *Vict. c.* 12)—*Manchester Electric Lighting Order*, 1890.

The defendants were empowered by the Manchester Electric Lighting Order, 1890, made under the Electric Lighting Acts, 1882 and 1888, and confirmed by Act of Parliament, to supply electrical energy in their district, and for that purpose to lay down electrical mains, but it was provided by clause 70 of the order that nothing therein contained should exonerate them from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. One of their mains fused, and the bitumen in which the main was laid in consequence became volatilized into an inflammable gas, which accumulated for some time, and then exploded, causing a fire by which the plaintiffs' goods were damaged:—

Held, that, apart from any question of negligence, the defendants were liable to the plaintiffs as for a nuisance by reason of the provisions of clause 70 of the order. MIDWOOD & Co., LIMITED *v.* MAYOR, ALDERMEN, AND CITIZENS OF MANCHESTER - - - - C. A. 597

EMPLOYER AND WORKMAN—*Compensation—Accident arising out of and in the course of Employment—Accident to Workman on Employer's Premises before Commencement of Work—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A number of the workmen employed on certain building work in the country had to come down from London each day by a train which brought them to the place of employment about twenty minutes before the time fixed for commencing work in the morning. The workmen employed on the works were paid by the hour, and each of them had, within three minutes after the time fixed for commencing work for the day, to deposit a ticket at a ticket office at the entrance of the works. It was to the knowledge of the employers the practice of the men coming from London, on their arrival by the train, to come to the works about twenty minutes before the time fixed for commencing work, and, after depositing their tickets at the ticket office, to go for refreshment to a mess cabin provided by the employers on the works for the supply of necessary refreshment to the workmen employed. One of these workmen, who had come from London one morning, while proceeding to deposit his ticket at the ticket office about twenty minutes before the time fixed for commencing work, sustained injuries through accidentally falling into an excavation on the works near the ticket office:—

Held, that the accident arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, s. 1. SHARP *v.* JOHNSON & Co., LIMITED - C. A. 139

2. —— *Compensation — Agriculture, Employment in — Workmen's Compensation Act*, 1900 (63 & 64 *Vict. c.* 22).

A workman was employed on a farm as farm carpenter, and assisted at hay and corn harvests, rick-making, and mangel-carting, and did work like the other farm labourers when he was with them. During three months of the year he was employed as gamekeeper. He sustained an injury by an accident, and applied for and obtained an award of compensation under the Workmen's Compensation Act, 1900. On appeal:—

Held, that there was evidence on which the county court judge could find that the applicant was employed in agriculture within the meaning of the Act. SMITH *v.* COLES - C. A. 827

3. —— *Compensation—Dependants in part on Workman's Earnings—Mode of assessing Compensation — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *First Schedule, s.* 1 (*a*), (*ii.*).

The widow of a deceased workman, who met his death through an accident arising out of and in the course of his employment, was mainly dependent upon her husband's earnings at the time of his death, but was earning about 2*s.* a week herself. The deceased workman did not appear to have had any source of income other than his wages. The widow claiming compensation under the Workmen's Compensation Act, 1897, against the employers of the deceased, a county court judge awarded her the sum of 150*l.*, being 5*l.* less than the amount of the deceased workman's earnings in the same employment during the three years prior to the accident. The

EMPLOYER AND WORKMAN—*continued.*

employers appealed against the award, on the ground that, in assessing the compensation, the county court judge had not complied with the provisions of the Workmen's Compensation Act, 1897, First Schedule, s. 1 (*a*), (ii.), which provides that, in cases of partial dependency, the compensation shall be such a sum as may be determined to be reasonable and proportionate to the injury to the dependants, because he had not taken into account the amount which the maintenance of the workman, if alive, would have cost, by way of reduction of the compensation, and that he had therefore misdirected himself:—

Held, that it was not shewn that the county court judge had proceeded otherwise than in accordance with the provisions of the Workmen's Compensation Act, 1897, First Schedule, s. 1 (*a*), (ii.), and therefore his award was good. OSMOND *v.* CAMPBELL & HARRISON, LIMITED C. A. 852

4. —— *Compensation—Dependency on Workman's Earnings at Time of his Death—Widow of Deceased Workman — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Upon a claim for compensation under the Workmen's Compensation Act, 1897, by the widow of a deceased workman it appeared that she had lived with and been maintained by him from their marriage up to June, 1904, when being out of work he left her and never afterwards contributed to her maintenance. Her only means of subsistence, after her husband left her, consisted of casual work and the charitable gifts of relatives, and she was for a week in the workhouse. About three weeks before his death, which occurred in October, 1904, the husband obtained employment, and he was earning wages, when his death was occasioned by an accident arising out of and in the course of his employment. The widow stated in evidence that, before her husband's death, she was expecting him back every day to provide a home. The county court judge found that she was dependent on her husband's earnings at the time of his death, and accordingly awarded her compensation.

Held, that the facts justified his finding. COULTHARD *v.* CONSETT IRON COMPANY, LIMITED C. A. 869

5. —— *Compensation—Disease communicated by Material worked on—Lead-poisoning—Gradual Accumulation of Lead in System—Ultimate Injury—Notice of Accident — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 2.

A workman, whose employment necessitated the handling of white and red lead, gradually accumulated lead in his system, with the ultimate result that he suffered from lead-poisoning, which produced partial paralysis and incapacity for work. On appeal from an award of compensation under the Workmen's Compensation Act, 1897:—

Held, that to bring a case within the Act there must be, by reason of s. 2, sub-s. 1, an injury by an accident of which notice can be given, and that, since it was not possible to indicate a time at which there was an accident which caused the injury to the workman, he was not entitled to an award under the Act. STEEL *v.* CAMMELL, LAIRD & Co. - - - - C. A. 232

EMPLOYER AND WORKMAN—*continued.*

6. —— *Compensation—Engine-driver—Stone wilfully thrown at Train—Accident arising out of the Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

Where an engine-driver, while driving a train under a bridge, was injured through a stone wilfully dropped on a train by a boy from the bridge:—

Held, that his injuries were caused by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, s. 1. CHALLIS *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY C. A. 154

7. —— *Compensation—"Engineering Work"—Alteration of Railroad—Tramway on Highway—Alteration of Roadway by Telephone Company—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The Workmen's Compensation Act, 1897, s. 7, sub-s. 2, defines "engineering work" as meaning (among other things) any work of alteration of a railroad.

A telephone company, which had statutory powers, employed a contractor to lay certain telephone wires. These wires had to be carried across a public highway, along which a tramway company had, by virtue of statutory powers, laid two lines of electric tramway, an up and a down line. This operation was being carried out in the following manner. A trench had been made in the roadway at right angles to the lines of the tramways up to a point close to the outer rail of the down line. The wires were to be carried along this trench, through a small tunnel under the rails of the down line, along a trench which had been made in the roadway between the up and down lines, and thence, through a tunnel under the rails of the up line, to a trench dug across the remainder of the roadway. A workman in the employ of the contractor, while engaged in making the before-mentioned tunnel under the down line, was killed by a passing tramcar:—

Held (by Collins M.R. and Mathew L.J., Romer L.J. dissenting), that the deceased workman was employed in a "work of alteration of a railroad," and therefore in an "engineering work" within the meaning of the Workmen's Compensation Act, 1897. ADAMS *v.* SHADDOCK C. A. 859

8. —— *Compensation—Engineering Work—Tramway—Employment on Repairs—Physical Area of Undertaking—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

An applicant for compensation under the Workmen's Compensation Act, 1897, was a workman in the employment of a corporation, who were the owners of a system of electric tramways, and his duty was to repair the overhead wires. On the day on which he met with an accident he had repaired the wires at one place by means of a tower-wagon. In proceeding along a street, which followed the line of the tramway, to a place at which he had also to repair the wires, he was thrown from the wagon and injured.

EMPLOYER AND WORKMAN—*continued.*

On the application an award was made in his favour. On appeal:—

Held, that, having regard to the obligation on the corporation, as undertakers, to repair and keep in repair the whole extent of the tramway system, each act of repair by the workman at different parts of the tramway could not be treated as a separate engineering work, and that it was competent to the arbitrator to find that the accident happened within the area of the engineering work on which the workman was employed, so as to entitle him to compensation under the Act. ROGERS *v.* MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF CARDIFF - C. A. 832

9. —— *Compensation—Engineering Work, Employment on or in or about—Work ancillary to Engineering Work—Place used for Storage of Materials—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A workman in the service of contractors, who had contracted to take up the rails of certain existing horse tramways in a town, and lay down rails for new tramways to be worked by electric power, while employed in unloading and stacking rails intended for the new tramways in a yard belonging to a railway company, sustained injuries through an accident which arose out of and in the course of that employment. The rails had been brought by the railway, and, by arrangement between the railway company and the contractors, the latter were permitted to use a portion of the railway company's yard for the storage of the rails till they were required for the purposes of the new tramways. At the time of the accident the only work then commenced under the contract was the taking up of the rails of the old tramway in a street at a distance of about 700 yards from the railway company's yard:—

Held, that the workman was not at the time of the accident employed on or in or about an engineering work within the meaning of the Workmen's Compensation Act, 1897, s. 7. BACK *v.* DICK, KERR & CO., LIMITED - C. A. 148

10. —— *Compensation—Epileptic Fit—Fall into Hold of Ship—Accident arising out of Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

A workman employed in unloading coal from a ship, who was required in the course of his duty to stand by the open hatchway through which the coal was being brought up from the hold, was seized with an epileptic fit while at work, and fell into the hold and was seriously injured:—

Held, that regard must be had to the proximate cause of the accident resulting in the injury, which was to be found in the necessary proximity of the workman to the hatchway; that the accident therefore arose "out of" as well as "in the course of" his employment, and that he was entitled to compensation under the Workmen's Compensation Act, 1897. WICKS *v.* DOWELL & CO. - - - - - C. A. 225

11. —— *Compensation—"Factory"—Employment "on or in or about a Factory"—Gasworks—Gas Main in Street at a distance from Works—*

EMPLOYER AND WORKMAN—*continued.*

Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), s. 7.

A workman in the employ of a gas company was, in the course of his employment, engaged in making a trench in the roadway, under which one of their gas mains was laid, at a distance of a quarter of a mile from the works where the gas was manufactured, which works came within the definition of a "non-textile factory" given by the Factory and Workshop Act, 1901, s. 149, sub-s. 1 (*c*), when he was injured by an accident arising out of and in the course of his employment. The workman having claimed compensation under the Workmen's Compensation Act, 1897, the county court judge held that, at the time of the accident, he was employed "about a factory," inasmuch as the gas main was part of the gasworks, which were a factory, and accordingly awarded him compensation:—

Held, that the main was not part of a factory, and that the workman was not employed "about a factory" within the meaning of the Act, and therefore was not entitled to compensation. SPACEY *v.* DOWLAIS GAS AND COKE COMPANY C. A. 879

12. —— *Wages — Deductions in respect of Damaged Goods—"Workman"—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Truck Act*, 1896 (59 & 60 *Vict. c.* 44), *s.* 2.

The respondents, a firm of lacemakers, whose premises were a factory within the meaning of the Factory and Workshop Act, 1901, were in the habit in common with other lacemakers of handing finished lace after its removal from the machines to women called "clippers" for the purpose of having superfluous threads and material removed. The clippers, who were not employed exclusively by any one firm, undertook to get lace clipped, and applied to the manufacturers for lace, which they took home with them for that purpose. The lacemakers had no control over the clippers, who might and often did employ others to assist them in the work; the clippers might execute the work themselves or give it to others to execute, or might return it unexecuted. The clippers were responsible in case of the non-return of the lace, and were paid at the end of each week according to the work done; they were required to pay for damage done to the lace in clipping.

Lace was handed by the respondents to two clippers: one was an outsider who had never worked in the respondent's factory, and did the clipping at home herself; the other was employed daily in the factory, and after it was closed at night she occasionally took the work home to do and was assisted by her daughter. The lace handed to the two clippers having been damaged, a sum of sixpence was in each case deducted from the amount due to them at the end of the week; the conditions of s. 2 of the Truck Act, 1896, as to the making of deductions in respect of damaged goods were not complied with, and the deductions were illegally made if the clippers were workwomen within the Act:—

Held, that, as the clippers were not bound by the terms of their contracts to execute the work or any part of it themselves, they were not

EMPLOYER AND WORKMAN—*continued.*

workwomen within the meaning of s. 10 of the Employers and Workmen Act, 1875, and, therefore, were not entitled to the protection of s. 2 of the Truck Act, 1896.

Ingram v. *Barnes*, (1857) 7 E. & B. 115, 132, and *Pillar* v. *Llynvi Coal Co.*, (1869) L. R. 4 C. P. 752; 38 L. J. (C.P.) 294, followed. SQUIRE *v.* MIDLAND LACE COMPANY - - Div. Ct. 448

ENGINE-DRIVER—Workmen's compensation—Stone wilfully thrown at train - 154
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ENGINEER—Bankruptcy—Contract for works—Receiving order against contractor—Subsequent order by engineer for direct payment to firms—Title of trustee—Secured creditors—Priority - 713
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ENGINEERING WORK—Workmen's compensation - - - 148, 832, 859
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ENTRY—Right of entry of mortgagee—Relation back of right of possession—Trespass antecedent to entry—Right of action
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EPILEPTIC FIT—Fall into hold of ship—Workmen's compensation - - 225
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EQUITABLE EXECUTION—Receiver—Ex parte injunction - - - - 359
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ESTATE DUTY.
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EXECUTION—Attachment of debts—Garnishee order—Rights of garnishor—Debenture-holder—Priorities - - - 658
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FALSE REPRESENTATIONS—Obtaining a passport by—Conspiracy—Indictment—Direction to jury - - - 730
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FALSIFICATION OF ACCOUNTS—Omission of material particulars—Jurisdiction—Offence partly committed abroad 67
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FAMILY ARRANGEMENT — Estate duty — Policy of life insurance—Interest provided by the deceased - - 323
See REVENUE. 1.

FERRY—*Disturbance—Ferry from Vill to Vill—Change of Circumstances—New Traffic.*
A franchise of ferry from vill to vill is a right known to the law.
Under an indenture of lease from the Crown conveying a "ferry or right of passage across the river Medina between East Cowes and West Cowes in the Isle of Wight," together with two landing-places, one in West Cowes and the other in East Cowes, the plaintiffs claimed an exclusive right of ferry between any point on the east bank and any point on the west bank of the river within East Cowes and West Cowes respectively. East Cowes and West Cowes were two populous districts. The termini of the ferry, which was an ancient ferry, had always been two defined points, though not always the same two points, one on each bank of the river:—
Held, that the indenture conveyed a right of ferry between the two landing-places, and not an exclusive right of ferry between any point on the east bank and any point on the west bank of the Medina within East Cowes and West Cowes respectively.
Semble, that East Cowes and West Cowes are not vills in such a sense that an exclusive right of ferry between them could be sustained in point of law.
The defendants, a steamboat company carrying passengers in steamers between the mainland and Cowes, conveyed those and other passengers in steam-launches between East Cowes and West Cowes, embarking and landing them at two pontoons distant respectively 230 yards and 875 yards north of the landing-places of the plaintiffs' ferry. The evidence shewed that the defendants' launches dealt with a traffic which had recently come into existence, and which was different from that dealt with by the plaintiffs:—
Held, that there had been no disturbance of the plaintiffs' ferry. COWES URBAN DISTRICT COUNCIL AND EAST COWES URBAN DISTRICT COUNCIL *v.* SOUTHAMPTON, ISLE OF WIGHT, AND SOUTH OF ENGLAND ROYAL MAIL STEAM PACKET COMPANY - - - - Kennedy J. 287

FINANCE ACT.
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FINE—Motor car—Appeal—Costs—Summary jurisdiction - - - - 456
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FOOD AND DRUGS—Sale of.
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HARBOURS AND DOCKS—*Dock Dues—Right to detain Vessel until Dues paid—Maritime Lien for Crew's Wages—Priority—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *ss.* 248, 253.
Sect. 253 of the Mersey Dock Acts Consolidation Act, 1858, which provides that while any dock tonnage rates remain unpaid in respect of any vessel liable thereto the Mersey Docks and Harbour Board may cause such vessel to be detained until all such rates have been paid, gives the board a paramount right to detain a vessel until the dock tonnage rates due in respect of her are paid, notwithstanding that the master and crew of the vessel have a maritime lien upon her for wages due before she entered the dock. THE EMILIE MILLON - - - C. A. 817

HIGH BAILIFF.
See under BAILIFF.

HIGHWAY—*Extraordinary Traffic—Locomotive—Traction Engine—Nuisance—Injury to Road—Default of Local Authority in Maintenance of Road—Locomotive Act*, 1861 (24 & 25 *Vict. c.* 70), *s.* 13; *Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 6.
In an action by the Attorney-General, on the relation of a county council, to restrain the defendant from using a traction engine upon a road in such a way as to cause a public nuisance, it was at the trial found by Jelf J. as a fact that the condition of the road was not caused primarily by the defendant's traction traffic, but partly by the traction traffic, partly by stone haulage by carts and horses, partly by the ordinary traffic, and partly by the weather, but primarily and chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic (including the traction traffic), which was not more unusual or onerous than they ought to have expected to come upon it:—
Held, by the Court of Appeal (affirming the judgment of Jelf J.), that upon the facts so found the plaintiffs were not entitled to a perpetual injunction to restrain the defendant from bringing

HIGHWAY—*continued.*
his traction traffic upon the road, and that an interlocutory injunction which had been granted upon affidavit evidence must be dissolved. Attorney-General and Monmouthshire County Council *v.* Scott - - - **C. A. 160**

2. —— *Subsidence caused by Mining Operations—Measure of Damages—Local Government—Urban Sanitary Authority.*

The defendants were the owners of a mine extending under a highway which was vested, under s. 149 of the Public Health Act, 1875, in the plaintiffs as the urban sanitary authority. While lawfully working the mine the defendants let down the surface of the highway, which the plaintiffs restored to its former level. In an action by the plaintiffs to recover damages for the injury to the highway:—

Held, that the proprietary right of the plaintiffs in the highway was a limited right only, and was confined to what was necessary to maintain the road as a highway, and that the proper measure of damages was not the cost of restoring the highway to its original level, but the cost of making it as commodious as before to the public. Wednesbury Corporation *v.* Lodge Holes Colliery Company - - - **Jelf J. 823**

—— Workmen's compensation — Tramway on highway—"Engineering work" **859**
See Employer and Workman. 7.

HIRE — Charterparty — Shipowner's lien for unpaid hire—Hire accruing due - **92**
See Shipping. 3.

HOTEL—Income tax—Deductions—Loss arising from negligence - - - **350**
See Revenue. 6.

HOUSE — Unfurnished — Defective premises — Promise by landlord to repair—Accident —Damages - - - - **757**
See Landlord and Tenant. 3.

HUSBAND AND WIFE—*Action by Wife against Husband—Detention of Goods—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 17.

An action will lie at the suit of a married woman against her husband for the return of her personal property detained by him. Larner *v.* Larner - - - - **Div. Ct. 539**

2. —— *Principal and Agent—Goods supplied on Order of Wife—Judgment against Wife for Part of entire Price—Election not to sue Husband for Balance.*

An action was brought to recover the balance of an account for groceries supplied by the plaintiff to the defendants, a husband and wife living together, upon the order of the wife. Upon an application under Order xiv. against both defendants the wife admitted her liability to the amount of 4*l.*, and claimed that that was all that was due to the plaintiff. The master accordingly made an order against her for 4*l.*, not in respect of any particular items of the plaintiff's bill, but on account of his claim generally, and he gave both the defendants leave to defend for the balance. At the trial the verdict passed for the plaintiff against the husband for the balance claimed, the jury finding that there was no joint

HUSBAND AND WIFE—*continued.*
liability of husband and wife, but that the husband was solely liable:—

Held (by Lord Alverstone C.J. and Kennedy J., Jelf J. dissenting), that recovery of judgment against the wife for the 4*l.*, although it was part of an entire claim, was not conclusive evidence of an election not to proceed against the husband for the balance, and that the plaintiff was entitled to recover.

Morel Brothers v. *Westmoreland* (*Earl of*), [1904] A. C. 11, distinguished. French *v.* Howie - - - - **Div. Ct. 580**

ILLEGITIMATE CHILD — Settlement — Residence of child under sixteen with parent —Acquisition of settlement while under sixteen - - - - **203**
See Poor Law. 2.

INCOME TAX.
See Cases under Revenue.

INDEMNITY — Principal and surety — Bankruptcy of principal—Double proof **307**
See Bankruptcy. 6.

INDICTMENT—Conspiracy—Obtaining a passport by false representations—Direction to jury - - - - **730**
See Criminal Law. 2.

INFANT—Probate action—Contract by parties that costs shall be paid out of the estate —Illegality—Infant co-contractor **768**
See Contract.

INJUNCTION—*Practice—Ex parte Injunction—Equitable Execution—Receiver—Rules of Supreme Court, Order* L., *r.* 15 (*a*), *App. K, Form No.* 61 (*a*).

Where on the issue of a summons for the appointment of a receiver of property by way of equitable execution an order was made ex parte in the form App. K, No. 61 (*a*), for an injunction to restrain the judgment debtors from dealing with the property until after the hearing of the application:—

Held, that the injunction ought not to be granted in the absence of anything to shew that there was danger of the property being made away with by the judgment debtors before the hearing of the application for a receiver. Lloyd's Bank, Limited *v.* Medway Upper Navigation Company - - **C. A. 359**

INSTALMENTS — Income tax — Annuity—Sale by railway—Purchase-money—Payment of annual instalments with interest **413**
See Revenue.

INSURANCE, FIRE — *Subrogation — Notice to Treat for Insured Property—Loss by Fire after Notice to Treat—Payment by Insurers to Assured —Renouncement of Assured's Rights in respect of Insured Property — Right of Insurers to recover from Assured the Amount paid.*

The defendant insured her buildings against fire with the plaintiff company. During the currency of the policy a corporation gave the defendant a notice to treat for the buildings under the Lands Clauses Consolidation Act, 1845. Before anything had been done under that notice the buildings were destroyed by fire, and the plaintiffs paid to the defendant an

INSURANCE, FIRE—*continued.*

agreed sum as the amount of her loss. Subsequently the amount to be paid by the corporation on taking over the property pursuant to their notice to treat was agreed between the defendant and the corporation at a sum arrived at by taking into account the money paid by the plaintiffs to the defendant under the policy, the corporation agreeing to indemnify the defendant against any claim which might be made against her by the plaintiffs:—

Held, that, the contract being one of mere indemnity, the plaintiffs upon payment of the agreed amount of the loss became entitled to all the rights of the defendant in respect of the destroyed property; that those rights included a right to be paid by the corporation the value of the property as it existed at the date of the notice to treat; that the defendant could not by any agreement with the corporation deprive the plaintiffs of that right; and therefore that the plaintiffs were entitled to recover from the defendant the amount paid by them to her in respect of the loss insured against. PHŒNIX ASSURANCE COMPANY *v.* SPOONER - Bigham J. 753

INSURANCE, LIFE—Estate duty — Policy of life insurance—Interest provided by the deceased—Family arrangement - 323
See REVENUE. 1.

—— Mortgage of policy — Indemnity — Bankruptcy of principal—Proof of surety—Double proof - - - 307
See BANKRUPTCY. 6.

INSURANCE, MARINE — *Insurable Interest — Agents in United Kingdom of Foreign Ship — Advances for Necessaries—Admiralty Court Act*, 1840 (3 & 4 *Vict.* c. 65), s. 6.

The plaintiffs, the agents in the United Kingdom of a foreign ship, effected an insurance for a named voyage "on disbursements against the risk of total and constructive total loss of ship only," the perils insured against including perils of the seas. At the date of the policy the shipowners were indebted to the plaintiffs to a considerable amount for advances for the ship's disbursements, part of which had been made for the purposes of the particular voyage and part at prior dates. The ship reached her port of destination in the United Kingdom, but suffered severe damage on the voyage from perils of the seas, and, the estimated cost of repair exceeding her estimated value if and when repaired, it was a constructive total loss within the meaning of the policy. The freight, which was received and retained by the plaintiffs under their lien, was insufficient to recoup the plaintiffs the amount of their advances, and the plaintiffs, who had no lien upon the ship, brought an action on the policy of insurance to recover the balance of their advances:—

Held, that the plaintiffs, having a right under s. 6 of the Admiralty Court Act, 1840, to enforce their claim for advances, so far as they were in respect of necessaries supplied to the ship, by an action in rem, and for that purpose to arrest the ship, had an insurable interest in the ship to the extent of the unsatisfied balance of those advances. MORAN, GALLOWAY & CO. *v.* UZIELLI - - - Walton J. 555

INSURANCE, MARINE—*continued.*

2. —— *Practice — Discovery — Affidavit of Ship's Papers—Partial Land Transit.*

In an action against an underwriter upon a policy of insurance, which is substantially a marine insurance, the fact that a part of the transit is by land does not affect the right of the defendant to an affidavit of ship's papers.

Henderson v. *Underwriting and Agency Association*, [1891] 1 Q. B. 557, questioned. HARDING *v.* BUSSELL - - - - C. A. 83

3. —— *Sale of Goods c.i.f.—Policy effected for Amount in excess of Value of Goods—Payment by Underwriters of whole Amount Insured—Title of Seller or Buyer to the Excess Insurance Money.*

A contract for the sale of goods at a price to cover cost, freight, and insurance contained the clause—"Insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers." Subsequently to the sale the sellers effected a policy for a larger amount than 5 per cent. over net invoice, and handed that policy together with the shipping documents to the buyers in exchange for the price. A loss having occurred under the policy, the underwriters paid the buyers upon the whole amount insured:—

Held, that the buyers were not, to the extent to which the money received by them from the underwriters exceeded the amount of their loss, trustees for the sellers, but were entitled to retain it to their own use. LANDAUER *v.* ASSER Div. Ct. 184

—— Practice — Third-party procedure — Policy of reinsurance - - - 281
See PRACTICE. 3.

INTEREST—Income tax—Interest on borrowed money — Right to deduct and retain income tax - - - - 375
See REVENUE. 4.

—— Judgment—Entry of judgment—Damages to be ascertained—Interest on amount recovered — Judgment taking effect from time when given - - 516
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See PETITION OF RIGHT.

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JUDGMENT—Bankruptcy—Judgment for debt "and costs to be taxed"—Bankruptcy notice for debt alone issued before taxation of costs - - - 678
See BANKRUPTCY. 2.

—— Damages to be ascertained — Interest on amount recovered — Judgment taking effect from time when given - 516
See PRACTICE. 2.

JUDGMENT—*continued.*

—— Goods supplied on order of wife—Judgment against wife for part of entire price—Election not to sue husband for balance
See HUSBAND AND WIFE. 2. 580

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JURISDICTION—Bankruptcy — Adjudication — Annulment—Discretion - - 666
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—— Distress for poor-rate—Reasonable charges for taking, keeping, and selling—Action to recover excess - - - 108
See COUNTY COURT. 2.

—— Falsification of accounts — Omission of material particulars — Offence partly committed abroad - - - 67
See CRIMINAL LAW. 3.

—— International law—Annexation—Liabilities of conquered State — Jurisdiction of municipal Courts - - - 391
See PETITION OF RIGHT.

—— Justices — Certiorari — Exemption from closing - - - - 59
See LICENSING ACTS. 1.

—— Justices — Licensing Acts — Reference of question of renewal to quarter sessions
See LICENSING ACTS. 2. 478

—— Motor car—Appeal—Fine—Costs — Summary jurisdiction - - - 456
See JUSTICES.

JUSTICES—*Appeal — Fine — Costs — Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 11—*Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 5, 49.

By s. 11, sub-s. 1, of the Motor Car Act, 1903, a person guilty of an offence under that Act for which no special penalty is provided is liable on summary conviction to a fine not exceeding 20*l.*; and by sub-s. 2, an appeal to quarter sessions is given to any person adjudged to pay a fine exceeding 20*s.*

A person convicted under s. 9 of the Act of driving a motor car at a speed exceeding twenty miles an hour was fined 20*s.*, and the conviction adjudged him to pay to the clerk of the peace the sum of 1*l.*, and also pay to the informant the sum of 18*s.* for costs. An appeal to quarter sessions was dismissed on the ground that there was no right of appeal under the Act:—

Held, that a "fine" under s. 11, sub-s. 2, of the Act did not include the costs which the defendant was ordered to pay, and that therefore no appeal lay to quarter sessions. *Ex parte* NOVIS - - - - - Div. Ct. 456

—— Adulteration—Sample—Purchase for analysis—Mode of dividing sample - 88
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—— Larceny—Indictment for offence after previous conviction—Arraignment—Error
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—— Poor law.
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—— Railway company — Carriage of goods—Intent to avoid payment of "tolls" 113
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—— Seaman—Right to wages—Termination of voyage by capture - - - 315
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—— Sewers.
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—— Wages—Deductions in respect of damaged goods—"Workman" - - 448
See EMPLOYER AND WORKMAN. 12.

LANDLORD AND TENANT—*Distress—Trespass ab Initio—Second Distress for same Rent.*

A bailiff, employed to levy a distress for rent in arrear, illegally broke in the front door; he then seized the furniture, but before selling it left the house, and being refused admittance on his return made no attempt to regain possession. Subsequently the landlord put in a fresh distress in respect of the same rent by a different bailiff acting under a fresh distress warrant, who seized the furniture, which was replevied before sale by the owner:—

Held, that the proceedings under the first distress warrant was a trespass ab initio and void as a distress, and that the landlord, having had no opportunity of satisfying his claim for rent by means of that proceeding, could lawfully distrain under the second warrant for the same rent.

Attack v. *Bramwell*, (1863) 3 B. & S. 520, and *Bagge* v. *Mawby*, (1853) 8 Ex. 641, considered. GRUNNELL *v.* WELCH - - - Div. Ct. 650

LANDLORD AND TENANT—*continued.*

2. —— *Notice to quit—Tenancy at Yearly Rent—Habendum "until such Tenancy shall be determined as hereinafter mentioned"—Provision for Three Months' Notice to quit—Expiration of Notice.*

By an agreement of tenancy a public-house was let from a certain date "until such tenancy shall be determined as hereinafter mentioned" at a yearly rent of 70*l.* payable quarterly on certain named days, the tenant agreeing (inter alia) to keep the premises in repair, to obtain the renewal of the licences when necessary, to pay rates and taxes except landlord's property tax, and not to assign or underlet without the landlord's written consent. The agreement contained a provision that it should be lawful for either party to determine the tenancy thereby created by giving to the other three calendar months' notice in writing for that purpose:—

Held, that the agreement created a yearly tenancy determinable only by three months' notice expiring with any year of the tenancy. LEWIS *v.* BAKER - - - Jelf J. 576

3. —— *Unfurnished House—Defective Premises—Promise by Landlord to repair—Accident arising from Defect—Personal Injury to Wife of Tenant—Action to recover Damages—Non-liability of Landlord.*

The agent of the landlord of a house which had been let unfurnished, in consideration that the tenant would withdraw a threat to quit, promised that the defective condition of the kitchen floor should be repaired. No repairs were done, and some time afterwards the tenant's wife met with an accident which arose from the defective state of the floor. An action was brought by the tenant and his wife against the landlord to recover the expenses to which the tenant had been put and damages for the injury sustained by the wife. At the trial the jury found that the agent, in promising that the floor should be repaired, was acting within the scope of his authority, and they gave a verdict for the plaintiffs, with damages in each case, and judgment was entered accordingly. On appeal by the defendant from the judgment entered in favour of the wife:—

Held, by Collins M.R. and Romer L.J., Mathew L.J. dissenting, that the female plaintiff had no cause of action in respect of the injuries sustained by her. CAVALIER *v.* POPE C. A. 757

—— Crown. Chattels belonging to—Prerogative—Distress for rent—Privilege - 845
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—— Distraint on goods of lodger—Illegal distress—Liability of bailiff to action 501
See DISTRESS.

LARCENY—Indictment for offence after previous conviction—Error - - - 76
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LEASEHOLDS—"Trustee"—Onerous property—Disclaimer, Time for - - 704
See BANKRUPTCY. 8.

LICENCE.
See under LICENSING ACTS.

LICENSING ACTS—*Exemption from closing—Jurisdiction of Justices—Certiorari—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 26.

An order of justices under s. 26 of the Licensing Act, 1872, extending the hours during which a licensed house may be kept open for the sale of intoxicating liquors, is a judicial order, and may be brought up on certiorari. THE KING *v.* JOHNSON - - - - Div. Ct. 59

2. —— *Justices—Jurisdiction—Renewal of On Licences—Reference of Question of Renewal to Quarter Sessions—Notice to Licensed Person—Evidence on which Justices entitled to act—Licensing Acts*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42; 1904 (4 *Edw.* 7, *c.* 23), *s.* 1.

Sect. 1, sub-s. 1, of the Licensing Act, 1904, provides that the power to refuse the renewal of an existing on licence on grounds other than certain specified grounds (which do not include the ground that the licensed house is not required for the needs of the neighbourhood) shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from the justices and on payment of compensation. Sub-s. 2 provides: "Where the justices of a licensing district, on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon."

At an adjournment of the general annual licensing meeting the renewal of an existing on licence was objected to on the ground that the licensed house was not required for the needs of the neighbourhood. An inspector of police gave evidence on oath as to the number of licensed houses within a short distance of the house in question, the amount of population, and the character of the neighbourhood. The licence-holder had been served with notice to attend, and was present, but called no evidence. The justices had been supplied with plans of all the licensed houses in the district, and were acquainted with the locality and accommodation of the house in question and of the other licensed houses in the neighbourhood, and, acting upon the evidence and upon their own knowledge, they referred the question of the renewal of the licence to quarter sessions, with their report thereon:—

Held, that there was evidence upon which the justices could form the opinion that the question of the renewal of the licence required consideration, and refer the matter to quarter sessions under sub-s. 2.

Licensing justices cannot refer to quarter sessions, under s. 1, sub-s. 2, the question of the renewal of an existing on licence if no notice of objection has been given to the licence-holder,

LICENSING ACTS—*continued.*

and he has not been given the opportunity of attending at the hearing of his case before the justices and of tendering evidence.

Where the ground of objection to the renewal of a licence is that the licensed house is not required for the needs of the neighbourhood, the justices must have some evidence on oath that it is not so required before they can form the opinion that the question of the renewal requires consideration on that ground. It is not necessary, however, in all cases, that they should have before them detailed evidence differentiating the house in question from the other licensed houses in the neighbourhood; nor are they bound in forming their opinion to exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, and the habits of the inhabitants. THE KING *v.* TOLHURST. *Ex parte* FARRELL. THE KING *v.* COX. *Ex parte* WEST **Div. Ct. 478**

3. —— *Licence, Renewal of — Power of Licensing Justices to attach Conditions—Monopoly Value — Licensing Acts*, 1872 (35 & 36 *Vict.* c. 94), *s.* 50; 1874 (37 & 38 *Vict.* c. 49), *s.* 22; 1904 (4 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 2.

Sect. 4, sub-s. 2, of the Licensing Act, 1904, giving licensing justices power to attach conditions to the grant of a new on licence in order to secure to the public the monopoly value, does not apply to an order for the removal of a licence, and licensing justices therefore have no power to attach those conditions to the making of an order for removal. THE KING *v.* DRINKWATER AND OTHERS, LICENSING JUSTICES (WINCOTT'S CASE) **Div. Ct. 469**

4. —— *Licence—Renewal of On Licence—Conditions attached to Renewal—Licensing Justices—Right to require Reasonable Undertaking—Refusal to deliver Licence without Undertaking—Mandamus—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 9.

The justices of a licensing district have no authority, under s. 9 of the Licensing Act, 1904, to make the renewal of an existing on licence conditional on the applicant giving an undertaking as to the conduct and management of the business, in respect of matters not covered by the grounds for refusing the renewal of such a licence specified in s. 1 of the Act. THE KING *v.* DODDS (BIRKENHEAD LICENSING JUSTICES) - **C. A. 40**

5. —— *Licence—Renewal of On or Off Licence — Conditions attached to Renewal — Licensing Justices—Mandamus.*

Application for the renewal of a licence to a house, in respect of which a licence to consume beer either on or off the premises was in existence before May 1, 1869, and had been continuously renewed. The licensing justices, upon the application being made, required that the tenant should give an undertaking that no intoxicating liquor should be supplied to any customer, unless such liquor should be paid for at the time of delivery. A rule nisi was obtained by the tenant for a mandamus to the justices to issue the renewed licence to him without requiring him to enter into the undertaking. The justices did not appear, but they filed an affidavit in which they

LICENSING ACTS—*continued.*

stated that they had not refused to grant the renewal of the licence, and that they considered that the undertaking which, under the powers given them by the Licensing Act, 1904, they required the tenant to give was a reasonable one. The Divisional Court made the rule absolute on the ground that the provisions of s. 8 of the Wine and Beerhouse Act, 1869, were expressly kept alive by s. 9, sub-s. 3, of the Licensing Act, 1904, and that there was nothing in that Act which added to the jurisdiction of the justices under the former Act. REX *v.* GRIMWADE **Div. Ct. 50, n.**

6. —— *Offences — Opening Premises during Prohibited Hours—Delivery on Sunday of Goods purchased on Saturday—Appropriation of Goods sold—Licensing Act*, 1874 (37 & 38 *Vict.* c. 49), *s.* 9.

Two men went into a public-house on Saturday before closing time, and asked if they could have half a gallon of beer and if it could be delivered the next morning to them at the place where they were working; on being told that they could, they paid for the beer. The beer was directly afterwards drawn and put into a bottle, which was kept during the night in a building within the curtilage of the licensed premises, and was taken by the barman on the Sunday morning during prohibited hours and delivered to the purchasers. A charge against the licensee under s. 9 of the Licensing Act, 1874, of unlawfully opening his licensed premises for the sale of intoxicating liquor during prohibited hours on Sunday, having been dismissed by justices:—

Held, that there had been no sufficient appropriation of the beer to the purchasers on the licensed premises on the Saturday, and that the licensee ought to have been convicted.

Pletts v. *Beattie*, [1896] 1 Q. B. 519, distinguished.

Held, further, by Lord Alverstone C.J. and Kennedy J. (Ridley J. dissenting), that, assuming there had been a complete appropriation of the beer on the Saturday, the licensee was nevertheless liable to be convicted, on the ground that delivery of the beer on Sunday was an essential condition of the purchase, and that by opening his premises on that day for the carrying out of a material part of the contract of sale he had opened them during prohibited hours within the meaning of s. 9.

Per Ridley J.: Assuming that there had been a complete appropriation of the beer on the Saturday, its delivery on Sunday formed no part of the contract of sale. NOBLETT *v.* HOPKINSON **Div. Ct. 214**

LIEN — Charterparty — Sub-charterparty—Shipowner's lien for unpaid hire - **92**
See SHIPPING. 3.

—— Dock dues—Right to detain vessel until dues paid — Maritime lien for crew's wages—Priority - - - **817**
See HARBOURS AND DOCKS.

—— Traders—Bank loan to purchase goods—Letter of lien on goods—Construction—Secured creditors—Bill of sale **772**
See BANKRUPTCY. 7.

LIGHT—Electric.
See under ELECTRIC LIGHT.

LIMITATION—Of time for bringing action—Tramway worked by municipal authority—Injury to passenger - 1
See PUBLIC AUTHORITIES' PROTECTION.

LIMITATION OF TIME—For taking proceedings—Prevention of cruelty to children—Procedure - - - - 335
See CRIMINAL LAW. 1.

LOCAL GOVERNMENT — *Creation of County Borough — Loss of Borough's Contribution to County Expenses—Adjustment of Financial Relations—Compensation to County—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 32, 62.

By a provisional order and confirmation Act a borough theretofore forming part of a county was separated from the county and constituted a county borough, and thereupon the liability of the borough to contribute to the maintenance of the county bridges, main roads, and certain other county expenses ceased:—

Held, that the loss of this contribution was a matter with respect to which the arbitrator, appointed to adjust the financial relations between the county and the borough under s. 32 of the Local Government Act, 1888, had power to award compensation to the county. COUNTY COUNCIL OF DURHAM AND COUNTY BOROUGH OF WEST HARTLEPOOL - - - Channell J. 340

2. —— *Offences—Diseased Meat—"Depositing for the Purpose of Sale"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 28, *sub-s.* 1.

A person who has deposited, on premises other than his own, for the purpose of sale, diseased meat belonging to him and intended for the food of man, does not thereby commit any of the offences in respect of dealing with diseased meat which are specified in s. 117 of the Public Health Act, 1875, as amended by s. 28, sub-s. 1, of the Public Health Acts Amendment Act, 1890. FIRTH *v.* MCPHAIL - - - Div. Ct. 300

—— Default of local authority in maintenance of road — Extraordinary traffic — Locomotive - - - - 160
See HIGHWAY. 1.

—— Sewers.
See under SEWERS.

—— Sheep-Scab Order, 1898—Negligence of inspector—Liability of local authority 838
See DISEASES OF ANIMALS.

—— Streets.
See under STREETS.

—— Urban sanitary authority—Highway—Subsidence caused by mining operations—Measure of damages - - 823
See HIGHWAY. 2.

LOCOMOTIVES—Extraordinary traffic—Traction engine — Injury to road — Default of local authority in maintenance of road 160
See HIGHWAY. 1.

LODGER—Distraint on goods of—Landlord and tenant — Illegal distress — Liability of bailiff to action - - - 501
See DISTRESS.

LODGING-HOUSES — *Common Lodging-house — Charitable Institution—No Payment by Inmates —Common Lodging Houses Act*, 1851 (14 & 15 *Vict. c.* 28)—*London County Council (General Powers) Act*, 1902 (2 *Edw.* 7, *c. clxxiii.*), *Part IX.*

A house carried on as a charitable institution for the reception of destitute persons of the poorest class who are treated in a manner similar to that in which the frequenters of common lodging-houses are treated, with the exception that no payment of any kind is made by or on behalf of the persons admitted, is a common lodging-house within the Common Lodging Houses Act, 1851, and Part IX. of the London County Council (General Powers) Act, 1902.

Logsdon v. *Booth*, [1900] 1 Q. B. 401, and *Logsdon* v. *Trotter*, [1900] 1 Q. B. 617, followed. GILBERT *v.* JONES - - - Div. Ct. 691

LONDON — *Buildings — "Structure" — "Projection" beyond General Line of Buildings—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 22, *sub-s.* 1; *s.* 73, *sub-s.* 8; *s.* 164.

An iron framework, filled in on the front and sides with leaded glass and covered on the top with zinc, about 10 feet 6 inches long, and about 5 feet 6 inches high from the bottom to the top of the gable, was fixed to the front wall of a building by means of bolts at the bottom and stay-rods at the top. It came forward about 4 feet 6 inches from the front wall of the building, and at its lowest point was 11 feet above the pavement:—

Held, that the framework was not "a structure erected beyond the general line of buildings" within s. 22, sub s. 1, of the London Building Act, 1894, and was not a "projection" within s. 73, sub-s. 8.

Hull v. *London County Council*, [1901] 1 K. B. 580, followed. LONDON COUNTY COUNCIL *v.* SCHEWZIK - - - - Div. Ct. 695

—— Common lodging-house—Charitable institution—No payment by inmates - 691
See LODGING-HOUSES.

LONDON AND NORTH WESTERN RAILWAY—Carriage of goods in traders' trucks—Delay in transit—Demurrage - 437
See RAILWAY. 2.

MAINTENANCE—Assignment of debt—Chose in action—Indirect motive on part of assignee - - - - 364
See ASSIGNMENT OF DEBT.

MALICIOUS INJURIES TO PROPERTY — Fisheries — Poisoning fish in salmon river—Construction of statutes - 748
See CRIMINAL LAW. 4.

MANCHESTER—Electric lighting—Nuisance—Leakage of electricity — Explosion — Fire - - - - - 597
See ELECTRIC LIGHT.

MANDAMUS—Refusal to deliver licence without undertaking - - 40, 50, n.
See LICENSING ACTS. 4, 5.

MANOR—*Copyhold—Obligation of Copyholder to repair—Breach of Obligation—Forfeiture—Action*

MANOR—*continued.*

for Damages—Remedy of Lord against Executors of Copyholder—Waste.

The lord of a manor alleged a custom of the manor imposing upon the copyholders an obligation to keep their holdings in tenantable repair. For breach of this alleged obligation by a deceased copyholder in his lifetime the lord brought an action for damages against his executors as upon an implied contract to perform it. In support of the alleged custom he produced (1) the customary of the manor, from which it appeared that the copyholders were entitled to house-bote to be used on their copyholds; (2) entries in court rolls containing presentments by the homage when copyhold tenements were out of repair and forfeitures consequent on failure of the copyholders to repair them after presentment; also admittances of copyhold tenants containing licences to sublet provided all due reparations had been performed; (3) oral evidence shewing that the copyholders had repaired their tenements as and when required by the lord without any presentment by the homage :—

Held, that this evidence, being referable to the customary law common to all copyhold tenure whereby a copyhold tenant is liable to forfeiture for waste, was no evidence of any custom imposing on the copyholders a liability from which a contract to keep their holdings in tenantable repair was to be inferred.

Blackmore v. *White*, [1899] 1 Q. B. 293, distinguished. GALBRAITH *v.* POYNTON Bigham J. 258

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARRIAGE — *Contract — Illegality — Marriage Brokage—Introductions with a view to Marriage —Contract for Reward to bring about Introductions—Expense incurred in carrying out Contract —Rescission of Contract — Recovery of Money paid.*

A contract for reward to introduce another to persons of the opposite sex, with a view to marriage with one of those persons, is a marriage brokage contract and illegal; and money paid under such a contract can be recovered back by the person who paid it, although the other party to the contract has brought about introductions, and has incurred expense in so doing.

Decision of the Divisional Court, reported [1905] 1 K. B. 21, reversed. HERMANN *v.* CHARLESWORTH - - - - C. A. 123

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MEAT—Offences—Diseased meat—"Depositing for the purpose of sale" - - 300
See LOCAL GOVERNMENT. 2.

MERCHANT SHIPPING.
See under SHIPPING.

MERSEY DOCK—Dock dues—Right to detain vessel until dues paid—Maritime lien for crew's wages—Priority - 817
See HARBOURS AND DOCKS.

METROPOLIS.
See under LONDON.

METROPOLITAN OPEN SPACES—Burial ground —Addition to—Disused burial ground
See BURIAL. 2. 426

MINE—Highway—Subsidence caused by mining operations—Measure of damages 823
See HIGHWAY. 2.

"MISBEHAVIOUR"—Pauper—Disobedience to lawful order - - - 200
See POOR LAW. 1.

MORTGAGE—*Land—Right of Entry of Mortgagee —Entry—Relation back of Right of Possession— Trespass antecedent to Entry—Right of Action.*

After entry by a mortgagee of land his right of possession relates back to the time at which his legal right to enter accrued, so as to enable him to support an action against a wrong-doer for a trespass committed at a time antecedent to the entry.

Barnett v. *Guildford (Earl)*, (1855) 11 Ex. 19, approved and applied. OCEAN ACCIDENT AND GUARANTEE CORPORATION, LIMITED *v.* ILFORD GAS COMPANY - - - - C. A. 493

—— Of chose in action after commencement of bankruptcy — Bona fides — Protected transaction - - - - 683
See BANKRUPTCY. 5.

—— Policy of insurance — Indemnity — Bankruptcy of principal—Proof of surety—Double proof - - - 307
See BANKRUPTCY. 6.

MOTOR CAR—*Owner—Refusal to give Name and Address of Driver—Conviction, Form of—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 1, *sub-s.* 3.

A conviction of the owner of a motor car under s. 1, sub-s. 3, of the Motor Car Act, 1903, stated that the defendant did unlawfully refuse to give the name and address of the person who at a specified time and place was driving the defendant's motor car, such name and address being required in order that proceedings might be taken against him under s. 1 of the Motor Car Act, 1903, and rule 6, art. 4, of the Statutory Rules and Orders, 1904 :—

Held, that the conviction was bad, in that it did not state what offence the driver of the motor car was alleged to have committed.

It is not a condition precedent to the obligation of the owner of a motor car to give the name and address of the driver of his car that the driver should previously have been asked for and should have refused to give his name and address. THE KING *v.* HANKEY Div. Ct. 687

—— Appeal — Fine — Costs—Summary jurisdiction - - - - - 456
See JUSTICES.

MUNICIPAL CORPORATION.
See under CORPORATION.

NAVY — Vessel employed in coaling ships of navy — King's ship — Pilotage dues—Liability of master - - 723
See SHIPPING. 5.

NECESSARIES—Advances for—Insurable interest—Agents in United Kingdom of foreign ship - - - 555
See INSURANCE, MARINE. 1.

NEGLIGENCE—*Boarding-house Keeper—Goods of Guest—Theft by Inmate.*

The plaintiffs became boarders in a boarding-house kept by the defendant. They informed the defendant's manager that they had property which they wished to keep under lock and key, and asked for a key of their bedroom door. They were told by the manager that a second key could not be supplied, that they must not remove the key from the lock, as it was required for the purpose of giving the servants access to the room, and that the room would be quite safe as the people in the house were all known. On a subsequent occasion the plaintiffs again became boarders in the defendant's boarding-house, and occupied the same bedroom, in which a chest of drawers had in the meantime been placed. They asked the manager for a key of the chest of drawers, but none was supplied. The female plaintiff having left some jewellery in a locked hand-bag in one of the drawers, it was stolen by another inmate of the house, who had been admitted as a boarder without references, or introduction, or inquiry concerning him, and who turned out to have been previously convicted of theft. In an action by the plaintiffs against the defendant for the loss of the jewellery:—

Held, by Collins M.R. and Mathew L.J., that there was a duty on the part of a boarding-house keeper to take reasonable care for the safety of property brought by a guest into his house, and evidence for the jury of a breach of that duty:

Held, by Romer L.J., that there was a duty on the part of a boarding-house keeper to carry on his business with reasonable care, having regard to the nature and normal conduct of the business, as known to the guest, or as represented to the guest by him, and evidence of a breach of that duty whereby the plaintiffs' property was lost.

Dansey v. *Richardson*, (1854) 3 E. & B. 144, followed.

Holder v. *Soulby*, (1860) 8 C. B. (N.S.) 254, commented upon. SCARBOROUGH *v.* COSGROVE
C. A. 805

—— Loss arising from negligence—Hotel—Injury to guest—Income tax - 350
See REVENUE. 6.

—— Sheep-Scab Order, 1898—Negligence of inspector—Liability of local authority
See DISEASES OF ANIMALS. 838

NONCONFORMIST—Interment of, without rites of Church of England—Burial fees 565
See BURIAL. 1.

NOTICE—Bankruptcy notice—Validity—"Final judgment" - - - - 678
See BANKRUPTCY. 2.

—— Poor-rate—Appeal—Notice of objection to assessment committee—Time—Next practicable sessions - - 239
See RATES.

NOTICE—*continued.*

—— Railway company—Owner's risk note—Mode of packing likely to cause injury—Notice to company—Wilful misconduct - - - - - 532
See CARRIER.

—— To quit—Tenancy at yearly rent—Provision for three months' notice to quit - 576
See LANDLORD AND TENANT. 2.

—— Workmen's compensation—Notice of accident—Lead poisoning - - 232
See EMPLOYER AND WORKMAN. 5.

NUISANCE—Electric supply—Leakage of electricity—Explosion—Fire - - 597
See ELECTRIC LIGHT.

—— Locomotive—Extraordinary traffic—Traction engine—Injury to road - 160
See HIGHWAY. 1.

—— Notice to abate—Sewer or drain - 34
See SEWERS. 2.

OFFENCES—Diseased meat—"Depositing for the purpose of sale" - - 300
See LOCAL GOVERNMENT. 2.

—— Licensing Acts.
See under LICENSING ACTS.

OFFICIAL RECEIVER.
See under RECEIVER.

OPEN SPACES—Burial ground—Addition to—Disused burial ground - - 426
See BURIAL. 2.

ORDER AND DISPOSITION—Traders—Bank loan to purchase goods—Letter of lien on goods—Bill of sale—Reputed ownership - - - - - 772
See BANKRUPTCY. 7.

ORDINATION OF PRIESTS—Objections to candidate—Allegation of ritualistic practices - - - - 249
See ECCLESIASTICAL LAW.

PARTIES—Third-party procedure—Insurance (Marine)—Policy of reinsurance - 281
See PRACTICE. 3.

PASSPORT—Obtaining a passport by false representations—Conspiracy—Indictment—Direction to jury - - - 730
See CRIMINAL LAW. 2.

PAUPER.
See under POOR LAW.

PAYMENT—Bankruptcy—Adjudication—Annulment—"Payment in full" - 666
See BANKRUPTCY. 1.

—— Deed of assignment for benefit of creditors—Effect of payment to trustee under deed—Act of bankruptcy - - 528
See BANKRUPTCY. 4.

PETITION OF RIGHT—*International Law—Annexation—Liabilities of Conquered State—Creditor's Rights against Conqueror—Act of State—Jurisdiction of Municipal Courts.*

A petition of right alleged that, before the outbreak of war between the late South African

PETITION OF RIGHT—*continued.*
Republic and Great Britain, gold, the produce of a mine in the Republic owned by the suppliants, had been taken from the suppliants by officials acting on behalf of the Government of the Republic; that the Government by the laws of the Republic was liable to return the gold or its value to the suppliants; and that by reason of the conquest and annexation of the territories of the Republic by Her late Majesty the obligation of the Government of the Republic towards the suppliants in respect of the gold was now binding upon His Majesty the King.

Held, on demurrer, that the petition disclosed no right on the part of the suppliants which could be enforced against His Majesty in any municipal Court.

There is no principle of international law by which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war. WEST RAND CENTRAL GOLD MINING COMPANY *v.* THE KING - - - - - Div. Ct. 391

PILOTAGE—Vessel employed in coaling ships of navy — King's ship — Pilotage dues—Liability of master - - 723
See SHIPPING. 5.

PLATE—*Assay—Hall-mark—Foreign Watches—Customs Act*, 1842 (5 & 6 *Vict. c.* 47), *s.* 59.

Gold and silver watch-cases imported into the United Kingdom from abroad are not "plate" within the meaning of s. 59 of the Customs Act, 1842, if they are imported together with the works as finished watches; *secus*, if the cases are imported separately from the works. GOLDSMITHS' COMPANY *v.* WYATT - Channell J. 586

PLEDGE—Sale or return—Sale for cash only—Passing of property—"Act adopting the transaction" - - - 172
See SALE OF GOODS. 2.

POISON—Fisheries—Poisoning fish in salmon river—Construction of statutes - 748
See CRIMINAL LAW. 4.

POLICY—Insurance.
See under INSURANCE, FIRE, INSURANCE, LIFE, and INSURANCE, MARINE.

POOR LAW—"*Misbehaviour*" — *Pauper — Disobedience to Lawful Order—Poor Relief Act*, 1815 (55 *Geo.* 3, *c.* 137), *s.* 5.

Wilful disobedience by a pauper of a lawful order of a workhouse official is not necessarily "misbehaviour" within the meaning of s. 5 of the Poor Relief Act, 1815. MILE END GUARDIANS *v.* SIMS - - - Div. Ct. 200

2. —— *Settlement—Illegitimate Child—Residence of Child under Sixteen with Parent—Acquisition of Settlement while under Sixteen — Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A child, whether legitimate or illegitimate, living with a parent, cannot while under the age of sixteen acquire for itself an independent settlement.

West Ham Union v. *Holbeach Union*, [1903] 2 K. B. 627; [1904] 2 K. B. 121, discussed. WOOLWICH UNION *v.* FULHAM GUARDIANS Div. Ct. 203

—— Poor-rate.
See under RATES.

POOR-RATE.
See under RATES.

POSSESSION—Right of entry of mortgagee—Relation back of right of possession—Trespass antecedent to entry—Right of action - - - - 493
See MORTGAGE.

PRACTICE—*Discovery—Interrogatory—Defamation—Privilege—Information on which Defamatory Statement founded—Name of Informant—Interrogatory not administered bonâ fide for Purposes of Action.*

In an action for libel, in which the defence of privilege was set up, the plaintiff sought to administer to the defendants an interrogatory inquiring what information the defendants received which induced them to make the statement complained of, and from whom that information was derived. The Court being of opinion from correspondence which had passed between the parties that the interrogatory as framed was not put bonâ fide for the purposes of the pending action, but in order to enable the plaintiff to bring an action against a person or persons from whom the information was derived:—

Held, that the part of the interrogatory which asked from whom the information was derived must be disallowed. EDMONDSON *v.* BIRCH & Co - - - - C. A. 523

2. —— *Judgment of Court of Appeal—Entry of Judgment—Action for unliquidated Damages—Judgment for Defendant in Court of First Instance—Reversal on Appeal—Damages to be ascertained—Interest on Amount recovered—Judgment taking effect from Time when given—Antedating—Rules of Supreme Court, Order* XLI., *r.* 3.

Where a plaintiff fails in a Court of first instance on a claim for unliquidated damages, but on appeal an order is made that judgment should be entered in his favour for an amount of damages to be ascertained, the judgment does not, as a matter of course, take effect from the date of the trial of the action, so as to entitle the plaintiff to interest from that date upon the amount recovered, but it will only take effect from the date at which it was given in the Court of Appeal, unless an order is made by that Court under Order XLI., r. 3, that its judgment shall be antedated. BORTHWICK *v.* ELDERSLIE STEAMSHIP COMPANY (No. 2) - - - C. A. 516

3. —— *Third-party Procedure — Insurance (Marine) — Policy of Reinsurance — Rules of Supreme Court*, 1883, *Order* XVI., *r.* 48.

Where in an action on a policy of marine insurance the defendants sought under Order XVI., r. 48, to bring in as a third party the underwriter of a policy of reinsurance on the same subject-matter:—

Held, that the third-party procedure was not applicable to such a case, inasmuch as a contract

PRACTICE—*continued.*
of reinsurance was not one of "indemnity" within the meaning of the rule. NELSON *v.* EMPRESS ASSURANCE CORPORATION, LIMITED. FABER, THIRD PARTY - - - C. A. 281

—— County court.
See under COUNTY COURT.

—— Discovery — Affidavit of ship's papers—Partial land transit - - 83
See INSURANCE, MARINE. 2.

—— Equitable execution—Receiver—Ex parte injunction - - - - 359
See INJUNCTION.

—— Procedure—Prevention of cruelty to children — Limitation of time for taking proceedings - - - 335
See CRIMINAL LAW. 1.

PREROGATIVE—Crown, Chattels belonging to—Distress for rent—Privilege—Landlord and tenant - - - 845
See CROWN.

PREVENTION OF CRUELTY TO CHILDREN—Limitation of time for taking proceedings—Retrospective effect of statute—Procedure - - - - 335
See CRIMINAL LAW. 1.

PRINCIPAL AND AGENT—Goods supplied on order of wife—Judgment against wife for part of entire price—Election not to sue husband for balance - - 580
See HUSBAND AND WIFE. 2.

PRINCIPAL AND SURETY—Bankruptcy of Principal—Proof of surety for estimated amount of liability to pay future interest and premiums—Double proof - 307
See BANKRUPTCY. 6.

PRIORITY—Attachment of debts—Execution—Rights of Garnishor—Debenture-holder—Priorities - - - - 658
See ATTACHMENT.

—— Bankruptcy—Receiving order against contractor—Subsequent order by engineer for direct payment to firms—Title of trustee - - - - 713
See BANKRUPTCY. 3.

—— Dock dues—Right to detain vessel until dues paid—Maritime lien for crew's wages - - - - 817
See HARBOURS AND DOCKS.

PRIVATE INTERNATIONAL LAW.
See under INTERNATIONAL LAW.

PRIVILEGE—Crown, Chattels belonging to—Prerogative—Distress for rent—Landlord and tenant - - - 845
See CROWN.

—— Defamation — Interrogatory not administered bonâ fide for purposes of action
See PRACTICE. 1. 523

PROBATE—Probate action—Contract by parties that costs shall be paid out of the estate—Infant co-contractor—Illegality
See CONTRACT. 768

PROOF—Bankruptcy of principal — Proof of surety for estimated amount of liability to pay future interest and premiums—Double proof - - - 307
See BANKRUPTCY. 6.

PROTECTED TRANSACTION—Mortgage of chose in action after commencement of bankruptcy—Bona fides - - 683
See BANKRUPTCY. 5.

PUBLIC AUTHORITIES' PROTECTION—*Limitation of Time for bringing Action—Tramway worked by Municipal Authority—Injury to Passenger—Action for Damages—Public Authorities Protection Act*, 1893 (56 & 57 *Vict.* c. 61), *s.* 1.

A municipal corporation constructed and worked an electric tramway under the authority conferred on them by an Order made by the Light Railway Commissioners, in pursuance of the Light Railways Act, 1896, and confirmed by the Board of Trade, and having therefore, by s. 10 of that Act, the force of a statute. On the construction of the Order the Court held that it imposed on the corporation an obligation, after the tramway had been opened for traffic, to run cars and to carry passengers in them.

A passenger on one of the cars, who had paid his fare and had taken a ticket in the ordinary form, without any special conditions, was while travelling injured by the fracture of the conducting-rod, which fell upon him. He brought an action against the corporation for damages, alleging that the accident had happened through the negligence of the defendants or their servants:—

Held, that the action was in substance founded on a breach by the defendants of their duty as a public authority under their Light Railways Order; that they were entitled to the protection given by the Public Authorities Protection Act, 1893; and that, as the action had not been brought within six months from the happening of the injury, it must fail.

Decision of Bigham J. affirmed.

The Ydun, [1899] P. 236, and *Parker* v. *London County Council*, [1904] 2 K. B. 501, followed. LYLES *v.* SOUTHEND-ON-SEA CORPORATION - - - - - C. A. 1

PUBLIC HEALTH—Offences—Diseased meat—"Depositing for the purpose of sale"
See LOCAL GOVERNMENT. 2. 300

—— Sewers.
See under SEWERS.

—— Streets.
See under STREETS.

QUIT—Notice to quit—Tenancy at yearly rent—Provision for three months' notice to quit - - - - - 576
See LANDLORD AND TENANT. 2.

RAILWAY — *Carriage of Goods—Rates and Charges—Intent to avoid Payment of "Tolls"—Railways Clauses Act*, 1845 (8 & 9 *Vict.* c. 20), *ss.* 98, 99.

The appellants brought to the respondents' goods station three cases of goods for the purpose of having them carried by the respondents on

RAILWAY—*continued.*

their railway, and delivered to the respondents' servant consignment notes in which the goods had been misdescribed by the appellants with the object of procuring the carriage of the goods at a lower rate than would have been charged if they had been correctly described. No express demand was made by the respondents' servant for an account of the goods, but by the course of business known to the appellants the goods would not have been received by the respondents if consignment notes had not been delivered. The appellants were charged, under ss. 98 and 99 of the Railways Clauses Act, 1845, with giving a false account of the goods with intent to avoid the payment of the tolls in respect thereof, and convicted:—

Held, that ss. 98 and 99 apply to cases where the railway company are themselves acting as carriers; that the conviction was right, because, assuming that it was necessary to prove that there had been a demand for an account, there was evidence on which the magistrate could find that there had been a demand.

But, *quære*, whether, where a false account is delivered, it is necessary to prove a demand. BARR, MOERING & Co. *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - **Div. Ct. 113**

2. —— *Carriage of Coal in Traders' Trucks—Delay in Transit—Demurrage for unreasonable Detention of Trucks—London and North Western Railway Company (Rates and Charges) Orders Confirmation Act*, 1891 (54 & 55 *Vict. c. ccxxi.*), *s.* 6.

By s. 6 of the London and North Western Railway Company (Rates and Charges) Act, 1891, where merchandise is conveyed in trucks not belonging to the company, the trader is entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period.

Coal in owners' trucks was conveyed by a railway company for the applicants, a firm of coal merchants, from certain collieries on their line of railway to the applicants' reserved sidings in London, the trucks being returned to the collieries without additional charge; the average duration of the transit during a period of twelve consecutive months was two and a half working days. The applicants complained that in thirty-three instances during the twelve months their trucks had been detained an unreasonable time in transit, the time taken in nineteen instances being four days, in twelve instances five days, in one instance six days, and in one instance seven days, and they claimed to be entitled to demurrage in respect of the unreasonable detention of these trucks:—

Held, first, that s. 6 applied to a claim for detention of the trucks during transit, and not merely to cases where the detention occurred before its commencement or after its conclusion; secondly, that the time occupied in the thirty-three instances in the transit being largely in excess of the average, the onus was upon the defendants to shew that the period of detention of the trucks was not unreasonable, and that they had failed on the facts to discharge that onus; and, thirdly, that a sum of 6*d.* per ten-ton truck

RAILWAY—*continued.*

per day was a reasonable allowance in respect of the detention. CHARRINGTON, SELLS, DALE & Co. *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - **Railway and Canal Commission 437**

—— Engine-driver—Workmen's compensation—Stone wilfully thrown at train - **154**
See EMPLOYER AND WORKMAN.

—— Income tax—Annuity—Sale of railway—Purchase-money—Payment by annual instalments with interest - - **413**
See REVENUE. 2.

—— Owner's risk note—Mode of packing likely to cause injury—Notice to company—Wilful misconduct - - - **532**
See CARRIER.

—— Workmen's compensation — Alteration of railroad—"Engineering work" - **859**
See EMPLOYER AND WORKMAN. 7.

RATES—*Appeal—Notice of Objection to Assessment Committee—Time—Next practicable Sessions—Poor-rate—Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38), *s.* 4—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

On an appeal against a poor-rate made on April 21, 1903, for the ensuing year, it appeared that the appellants had not given notice of objection to the valuation list upon which the rate was based till October 26, 1903. There had been meetings of the assessment committee on May 15 and August 13, and Courts of quarter sessions were held on June 27 and October 27. The appellants, having failed to obtain relief at the meeting of the assessment committee held on November 12, appealed against the rate to the quarter sessions held on January 2, 1904:—

Held, that, the notice of objection to the valuation list having been given during the currency of the rate, and it not having been proved that the appellants had been guilty of unreasonable delay, the appeal must be considered as having been brought to the next practicable quarter sessions within the meaning of the Poor Relief Act, 1743, s. 4, and therefore was not too late.

Judgment of a Divisional Court, [1905] 1 K. B. 89, affirmed. IMPERIAL AND GRAND HOTELS COMPANY *v.* CHRISTCHURCH GUARDIANS **C. A. 239**

—— Distress for poor-rate — Jurisdiction — Reasonable charges for taking, keeping, and selling—Action to recover excess
See COUNTY COURT. 2. **108**

RATES AND CHARGES—Carriage of goods—Intent to avoid payment of "tolls" **113**
See RAILWAY. 1.

RECEIVER—Official receiver as trustee—Onerous property — Leaseholds — Disclaimer, Time for - - - - **704**
See BANKRUPTCY. 8.

—— Practice—Equitable execution—Ex parte injunction - - - - **359**
See INJUNCTION.

RECEIVING ORDER—Against contractor—Subsequent order by engineer for direct payment to firms—Title of trustee—Secured creditors—Priority - 713
See BANKRUPTCY. 3.

REINSURANCE — Policy of — Practice—Third-party procedure - - - 281
See PRACTICE. 3.

REMITTED ACTION—Discretion of judge as to costs - - - - - 196
See COUNTY COURT. 3.

RENEWAL—Licence.
See under LICENSING ACTS.

RENT—Crown, Chattels belonging to—Prerogative — Distress for rent — Privilege — Landlord and tenant - - 845
See CROWN.

—— Distress—Trespass ab initio—Second distress for same rent - - - 650
See LANDLORD AND TENANT. 1.

REPAIR—Copyhold — Breach of obligation of copyholder to repair—Forfeiture 258
See MANOR.

REPUDIATION—Contract for delivery of goods by instalments—Wrongful repudiation of contract by buyer—Waiver - 543
See SALE OF GOODS. 1.

REPUTED OWNERSHIP—Traders—Bank loan to purchase goods — Letter of lien on goods—Construction—Bill of Sale 772
See BANKRUPTCY. 7.

RESIDENCE — Company registered abroad—Directors' meetings in England and abroad—Majority of directors in England - - - - - 612
See REVENUE. 5.

REVENUE — *Estate Duty—Policy of Life Insurance — Interest provided by the Deceased — Family Arrangement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*d*); *s.* 3.

The equitable tenant for life of an estate had raised on the security of his life estate and of certain policies of insurance on his life sums amounting to 59,121*l.* By an arrangement made between him and the defendant, his son, who was equitable tenant in tail in remainder, the estate was disentailed, and the sum of 71,000*l.* was raised on mortgage of the fee, out of which the mortgages for 59,121*l.* were paid off. As a further part of the same arrangement, the policies, having been reassigned to the tenant for life, were by him assigned to the defendant, and the estate was resettled upon trust (inter alia) out of the rents and profits to pay the interest on the mortgage debt of 71,000*l.*, and the premiums necessary for keeping on foot the policies, but, in case of any of the policies being surrendered by the defendant, then to pay the amount that would otherwise have been payable as a premium in respect of it to the defendant, and to apply the residue of the rents and profits in paying to the defendant the sum of 1000*l.* a year, and, subject to the trusts aforesaid, in trust for the tenant for life with remainder on his decease to the defendant in fee. Subsequently, in consideration of the sum of 4100*l.* paid to him, the tenant for life assigned (by way of surrender) his life estate to the defendant; but the assignment was expressed to be subject to the trust for keeping on foot the policies, and the amount of the price paid to the tenant for life was calculated on the footing that the life estate was subject to that trust. The policies were kept up under the before-mentioned trust, and, on the death of the tenant for life, the defendant received the policy moneys. On an information by the Crown claiming estate duty on the amount of these moneys:—

Held, reversing the judgment of Phillimore J., that they were interests provided by the deceased within the meaning of the Finance Act, 1894, s. 2, sub-s. 1 (*d*), and therefore estate duty was payable by the defendant on them. ATTORNEY-GENERAL *v.* SIR WROTH PERIAM LETHBRIDGE (BART.) - - - - - C. A. 323

2. —— *Income Tax—Annuity—Sale of Railway — Purchase-money — Payment by Annual Instalments with Interest—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35) *and* 1853 (16 & 17 *Vict. c.* 34), *Scheds. C and D.*

The East India Company were, under contracts made between them and the plaintiff company, entitled to purchase three railways belonging to the plaintiff company at certain dates respectively for gross sums to be ascertained as therein provided, the East India Company having an option, instead of paying the gross sum, of paying for the railway by means of what was described as an "annuity" to be paid to the plaintiff company for a term of years, The rights of the East India Company under these contracts subsequently became vested in the defendant. When the defendant's right of purchase accrued as regards two of the railways, but before it accrued as regards the third railway, an arrangement was made between the plaintiff company and the defendant for the purchase by the defendant of the three railways simultaneously, in consideration of an annuity for a term of years calculated at the rate of 5*l.* 12*s.* 6*d.* per annum for every 100*l.* of the plaintiff company's stock commuted at 125*l.* This amount of 5*l.* 12*s.* 6*d.* was stated in an Act of Parliament confirming the arrangement to have been arrived at on the basis of 5*l.* 7*s.* 6*d.*, part thereof being interest at the rate of 4*l.* 6*s.* per cent. per annum on the said amount of 125*l.*, and of a sum of 5*s.*, other part thereof, being the amount required to be set aside and invested half-yearly in every year at a like rate of interest in order to produce by means of a sinking fund the capital sum of 125*l.* or thereabouts at the end of the term for which the annuity was payable. On payment of the annuity income tax had been deducted by the defendant in respect of the whole of the annual payment. The plaintiffs contended that the deduction should only have been of income tax in respect of so much of the payment as represented interest on unpaid capital in accordance with the decision in *Secretary of State in Council of India* v. *Scoble*, [1903] A. C. 299:—

Held, that the fact that the purchase of the railways had been carried out by agreement, before the date at which the defendant's right of purchase accrued as regards one of the railways,

did not constitute a valid legal distinction between the present case and *Secretary of State in Council of India* v. *Scoble*, [1903] A. C. 299, and that the plaintiffs' contention was correct:

Held, further, that it was not correct to treat the before-mentioned statement in the Act of Parliament as indicating what proportions of the annual sum were respectively payable in respect of capital and of interest on unpaid capital. EAST INDIAN RAILWAY COMPANY *v.* SECRETARY OF STATE IN COUNCIL OF INDIA - C. A. 413

3. —— *Income Tax — Annuity or Annual Payment—Deduction of Income Tax—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 102; 1853 (16 & 17 *Vict. c.* 34), *s.* 40—*Customs and Inland Revenue Act*, 1881 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The plaintiff, the owner of a leasehold interest expiring in 1912 in certain property which was sublet at a gross rental of 1925*l.* but subject to the payment of a ground-rent of 300*l.* to the superior landlord, contracted with the defendants for the sale to them of his interest, the transaction being carried out by two deeds of even date. By the first deed the plaintiff conveyed and assigned the property to the defendants for the residue of the term, subject to the payment of the 300*l.* ground-rent to the superior landlord (which the defendants covenanted to pay), the consideration for the assignment being expressed to be the payment by the defendants of the sum of 1000*l.* to the plaintiff and the execution by the defendants of a deed of even date. By the latter deed the defendants covenanted with the plaintiff to pay him until the last day of the term the sum of 1625*l.* per annum by quarterly payments; no sum was fixed as the total amount to be paid. In making the quarterly payments the defendants, acting under s. 40 of the Income Tax Act, 1853, and s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, deducted income tax at the current rate, and the plaintiff sought to recover the amounts so deducted:—

Held, that the intention of the transaction was that the plaintiff should continue to receive as income to the end of the term the same net amount that he had previously received as rent; that the payments were payments of an annuity or other annual payment within the meaning of s. 40 of the Income Tax Act, 1853, and were not the payment of a fixed amount by instalments, and that the deductions in respect of income tax had therefore been properly made by the defendants. CHADWICK *v.* PEARL LIFE INSURANCE COMPANY - - - - Walton J. 507

4. —— *Income Tax—Charge upon Property in excess of Annual Value—Interest on Borrowed Money—Right to deduct and retain Income Tax—Interest "paid out of Profits or Gains brought into Charge"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *No. IV., r.* 10—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The defendants are in receipt of a large annual income derived from interest on loans and rents, and they are also possessed of certain land which they occupy themselves. They have from time to time under their statutory powers borrowed large sums of money, and in respect thereof have created capital stock, which stock and the dividends thereon are charged upon all their property, including the land occupied by them. The annual interest payable upon that stock is considerably in excess of the annual income received by them and of the annual value of the land occupied by them taken together; and the amount by which their income is insufficient to pay the interest on the stock they raise by means of rates:—

Held, that under the circumstances the defendants have no taxable income, and that when paying the interest upon their stock to the stockholders they are entitled to deduct and retain for their own use so much of the income tax upon that interest as is sufficient to recoup them the income tax paid by them, under Sched. A., upon the assessed annual value of the land occupied by them.

Judgment of Channell J., [1904] 2 K. B. 635, affirmed. ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL - - - - - C. A. 375

5. —— *Income Tax—Residence—"Person residing in the United Kingdom"—Company registered Abroad — Head Office Abroad — General Meetings Abroad—Directors' Meetings in England and Abroad—Majority of Directors in England—Company's Business in England and Abroad—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D—Foreign Corporation.*

A foreign corporation may be resident in this country for the purposes of income tax.

A company was incorporated and registered in South Africa. The office denominated its head office was in Kimberley in the Cape Colony, and it had an office in London. It owned extensive diamond mines in South Africa. The essential part of its business was the sale of the diamonds from its mines to a syndicate of diamond merchants of London under such conditions as to control the diamond trade of the world. The contracts of sale, which were annual contracts dealing with a year's output, were executed in London; they provided for the sale of diamonds to the syndicate, with delivery at Kimberley, in specified amounts at specified prices, and contained terms regulating the output of diamonds, the effect of which was to control the diamond trade. The general meetings of the company were held in Kimberley. Members of the company might name an address in South Africa to be registered as their address for the service of notices, and any member not naming such an address was to be deemed to have waived service of the notice upon him. The control of the company was vested in three life governors and sixteen ordinary directors, of whom four had to reside in England. Two of the three life governors and nine of the sixteen ordinary directors resided in the United Kingdom. The chairman and six ordinary directors resided in the Cape Colony. Meetings of the directors were held weekly in Kimberley and London with an interchange of minutes between the two places. The proceedings of the boards of directors sitting at Kimberley and London were regulated by by-laws which provided as follows: (1) That the course of business respecting technical management of the company's work and opera-

REVENUE—*continued.*
tions at its mines, expenditure for wages, and such like, should be determined upon by the directors in Kimberley, who should however consult the directors in London on matters of exceptional importance: (2) All other expenditure exceeding 25,000*l.* was to be determined upon by the majority of all the directors; but the directors in Kimberley with the sanction of the chairman might under special circumstances incur expenditure not exceeding at one time 50,000*l.* in addition. No further expenditure could be incurred unless the authority of the Kimberley directors was confirmed by the majority of all the directors: (3) The policy of the board respecting the disposal of diamonds and other assets, the working or development of the mines and the output of diamonds, application of profits, and appointment of directors was to be determined by the majority of all the directors: (5.) Matters to be determined by the majority of all the directors were to be determined by resolution to be submitted to meetings of directors in Kimberley and London, and the decision was to be in accordance with the vote of the majority thus ascertained: (6.) Except as before provided the directors in Kimberley and the directors in London were to have equal and concurrent authority. The majority of the directors was always in London. Matters referred to in by-law 3 were always dealt with in London, and in all important matters under by-law 5 the majority voting had always been in London. No case had ever occurred where the directors in Kimberley had overruled the decision of the directors in London. Under powers conferred upon the directors generally, the directors in London had appointed four committees to control various departments of the company's business and report to them. The general accounts of the company were kept at Kimberley, but the majority of the directors had a controlling influence upon the accounts:—

Held, that the conclusion to be drawn from the facts was that the company was residing in the United Kingdom within the meaning of s. 2, Sched. D, of the Income Tax Act, 1853, and also that the company exercised their trade in this country within the meaning of the same schedule. DE BEERS CONSOLIDATED MINES, LIMITED *v.* HOWE (SURVEYOR OF TAXES) **C. A. 612**

6. —— *Income Tax — Trade — Balance of Profits—Deductions—Expenses incurred in earning Profits—Expenses payable out of Profits—Loss arising from Negligence—Hotel—Injury to Guest —Damages—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D.*

A brewery company were the owners of a hotel which was carried on by a manager on their behalf and as part of their business. A guest at the hotel, who was injured by the fall of a chimney, sued the company for negligence causing the injury, and recovered judgment for damages and costs, which the company paid. They also incurred costs in defending the action. On a case stated by Commissioners of Income Tax:—

Held, that the expenses to which the company had been put by reason of their negligence were

REVENUE—*continued.*
not incurred by them in earning profits, but were payable out of profits after they were earned, and could not be deducted in estimating the profits of the year, for the purpose of the income tax, under Sched. D of the Income Tax Acts. STRONG & Co. *v.* WOODIFIELD - **C. A. 350**

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SALE OF GOODS—*Contract for Delivery of Goods by Instalments—Wrongful Repudiation of Contract by Buyer—Waiver by Buyer of performance of Conditions Precedent—Inferiority of portion of Goods to Description in Contract.*

A contract provided for the sale of rosewood for shipment in 1903, to be delivered at Hull in instalments during that year, cash payable against bill of lading. While the first consignment of rosewood was on the sea, the buyers repudiated the contract and refused to accept any rosewood under it upon the ground that the seller had committed a breach of a collateral oral agreement not to supply rosewood to any other person in the trade during 1903. When the bill of lading for the first consignment was tendered to the buyers they refused to accept it or to pay for the rosewood comprised in it; the rosewood was therefore sold by the seller as against the buyers, and the seller claimed as damages from the buyers for their refusal to accept the consignment the difference between the contract price and the price at which it was sold as against the contract. The second consignment, consisting of the balance of the rosewood, was likewise refused by the buyers on the same ground and sold as against them. It subsequently came to the knowledge of the buyers that a portion of the rosewood in the first consignment did not answer the description of the quality of rosewood in the contract, and it was admitted that there was some inferiority in a portion that would be compensated for by an allowance of about 6 per cent. on the value of the consignment. The second consignment was in accordance with the contract.

SALE OF GOODS—*continued.*
The seller having sued the buyers for damages for not accepting the rosewood, the judge at the trial found as a fact that the collateral oral agreement relied upon by the buyers had never been entered into:—

Held (affirming the judgment of Kennedy J.), that the original repudiation of the contract by the buyers was wrongful, and that by refusing to take delivery of the consignments on arrival on the ground that they had already repudiated the entire contract the buyers had waived the performance of conditions precedent on the part of the sellers, who were entitled to damages based upon the difference between the contract price of the rosewood and the price at which it had been sold by them as against the contract. BRAITHWAITE *v.* FOREIGN HARDWOOD COMPANY **C. A. 543**

2. —— *Sale or Return—Sale for Cash only—Passing of Property—Pledge—"Act adopting the Transaction"—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 18, *rule* 4.

The plaintiff, a manufacturing jeweller, delivered jewellery to H., a retail jeweller, on the terms of a memorandum headed "On approbation. On sale for cash only, or return. Goods had on approbation or on sale or return remain the property of W. [the plaintiff] until such goods are settled for or charged." H. being informed by L. that he had a customer who might buy the goods, delivered them to L. upon the terms of his paying cash or returning them in a few days. L. had no customer, and fraudulently pledged the goods with the defendant, a pawnbroker. In an action to recover the goods from the defendant:—

Held, that the goods were not delivered to H. "on approval, or on sale or return or other similar terms," within the meaning of s. 18, rule 4, of the Sale of Goods Act, 1893, and that even if they were, the pledging of them by L. did not amount to an act by H. "adopting the transaction"; that consequently the property did not pass out of the plaintiff by reason of the pledging, and that he was entitled to recover.

Bryce v. *Ehrmann*, (1904) 42 Sc. L. R. 23, distinguished. WEINER *v.* GILL. SAME *v.* SMITH **Bray J. 172**

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SALMON FISHERY—Poisoning fish in salmon river—Construction of statutes - **748**
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SECURED CREDITORS—Bankruptcy—Receiving order against contractor — Subsequent order by engineer for direct payment to firms—Priority—Title of trustees **713**
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—— Traders—Bank loan to purchase goods—Letter of lien on goods—Construction—Bill of Sale - - - - **772**
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SERVANT—Master and.
See under EMPLOYER AND WORKMAN.

SETTLEMENT (POOR LAW).
See under POOR LAW.

SEWERS—*Drain or Sewer—Drain-pipe draining several Houses belonging to the same Owner—Sewer draining into single Private Drain—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A drain-pipe receiving the drainage of several houses, the property of one owner, does not cease to be a sewer within the definition in s. 4 of the Public Health Act, 1875, because it is connected with a single private drain, to which s. 19 of the Public Health Acts Amendment Act, 1890, is applicable, and by means of which the drainage of the houses is ultimately conveyed to a public sewer.

Judgment of the Divisional Court, [1904] 2 K. B. 359, affirmed. JACKSON *v.* WIMBLEDON URBAN DISTRICT COUNCIL - - **C. A. 27**

2. —— *Drain or Sewer—Notice to abate Nuisance—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 94, 95.

The defendant had for some years discharged the sewage from his house into a pipe running alongside a country road, which pipe had been laid down by an adjoining owner for his own protection for the purpose of carrying off the surface water from the highway and so preventing it from flowing on to his premises. No water other than the rain water from the highway and the sewage from the defendant's house passed along the pipe. It had never been repaired by the local authority or treated by them as a sewer. A breakage having occurred in the pipe it became stopped up, and the defendant's sewage collecting above the stoppage caused a nuisance. The local authority took proceedings against the defendant under s. 94 of the Public Health Act, 1875, for the purpose of compelling him, as "the person by whose act, default, or sufferance the nuisance arose," to abate it:—

Held, (1) That it was no defence for the defendant upon those proceedings to shew that the pipe was a sewer which the local authority were liable to repair. (2) That under the circumstances it was not a sewer. WINCANTON RURAL DISTRICT COUNCIL *v.* PARSONS **Div. Ct. 34**

SHEEP-SCAB ORDER, 1898—Negligence of inspector—Liability of local authority **838**
See DISEASES OF ANIMALS.

SHIPPING—*Charterparty—Arbitration Clause—Cesser Clause—Bill of Lading—Incorporation of Terms of Charterparty—Claim for Demurrage at Port of Loading—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

It was provided by clause 39 of a charterparty, by which the plaintiffs' vessel was chartered by the defendants for the carriage of a cargo of wheat from Bahia Blanca to a port in the United Kingdom, that, if the loading of the cargo were delayed by reason of certain causes therein specified, the time so lost should not be counted as part of the lay-days, and that, if any dispute arose under that clause in the loading of the ship,

SHIPPING—*continued.*

the same should be settled in the Argentine Republic by arbitration in the manner therein mentioned. The charterparty contained the usual cesser clause providing that the charterers' liability should cease upon shipment of the cargo, provided the cargo was worth the bill of lading freight, dead freight, and demurrage at the port of shipment, and that the vessel should have a lien on the cargo for recovery of all such bill of lading freight, dead freight, demurrage, and all other charges whatsoever. A full cargo was shipped by the defendants under the charterparty, and bills of lading were given in respect thereof, by which the cargo was made deliverable to the defendants or their assigns, they paying freight for the said goods, against delivery, in cash, at a rate of freight in accordance with the charterparty. The bills of lading stated that all the terms and exceptions contained in the charterparty were therewith incorporated, and formed part thereof, and gave the shipowners an absolute lien on the cargo for the recovery of freight and demurrage and all other charges whatsoever. There was no dead freight, and the cargo shipped was worth the freight and charges. A dispute within the meaning of clause 39 having arisen with regard to delay in the loading of the ship between the plaintiffs and the defendants after the completion of the loading :—

Held, that, notwithstanding the cesser clause, and the fact that the defendants were the holders of the bills of lading, the provision for arbitration in clause 39 of the charterparty remained operative as between the plaintiffs and the defendants, and therefore that an action brought by the plaintiffs after the ship's arrival in the United Kingdom, claiming a declaration that they were entitled to a lien on the cargo for demurrage at the port of loading, should be stayed under s. 4 of the Arbitration Act, 1889.

Runciman & Co. v. *Smyth & Co.*, (1904) 20 Times L. R. 625, overruled. TEMPERLEY STEAM SHIPPING COMPANY *v.* SMYTH & Co. **C. A. 791**

2. —— *Charterparty—Rate of Discharge of Cargo—Fraction of a Day—Demurrage—Ballasting, Discharge of Cargo delayed by.*

The provision in a charterparty that the cargo is to be discharged "at the average rate of not less than ——— tons per day" means, in the absence of other words in the charterparty pointing to a different conclusion, that it is to be discharged in a number of days calculated at that rate, not in a number of hours calculated at that rate; and that, if a fraction of a day is required for the completion of the discharge, the charterer is entitled to the whole of that day.

Yeoman v. *Rex*, [1904] 2 K. B. 429, distinguished.

Where the taking in of ballast during the process of discharge of cargo is necessary for the safety of the ship and of the cargo remaining on board, the fact that the taking in of the ballast delays the discharge of the cargo does not relieve the charterer from his obligation to complete the discharge within the stipulated time. HOULDER *v.* WEIR - - - - **Channell J. 267**

3. —— *Charterparty—Sub-charterparty—Bill of Lading—Contract—Shipowner's Lien for unpaid Hire—Hire accruing Due—Withdrawal of Ship—Payment of Hire.*

When a ship is chartered, the charterparty being in the ordinary form and not amounting to a demise of the ship, and subsequently the ship is sub-chartered for a single voyage and bills of lading are signed by the captain in respect of cargo carried on that voyage, the contract contained in the bills of lading is a contract with the owner of the ship. The owner, or the captain as his agent, is entitled to collect the bills of lading freight, and to deduct from it any charterparty hire then owing, accounting for the balance, if any, to the sub-charterers. The rights of the parties are the same if the freight is collected by the ship's agent, appointed by the sub-charterers, he being for this purpose either the agent of the owner or the agent of all parties.

Marquand v. *Banner*, (1856) 6 E. & B. 232, distinguished.

A shipowner is not entitled to exercise a lien on freight in the hands of the ship's agent for charterparty hire not due but accruing due at the time the lien purported to have been exercised.

Where a charterparty provides that hire is to be paid half-monthly in advance, and that in default of payment the owner may withdraw the ship from the service of the charterer without prejudice to any claim the owner may otherwise have against the charterer, if the owner withdraws the ship in the middle of a half-month, he is only entitled to be paid hire in respect of that portion of the half-month during which the ship was in the service of the charterer. WEHNER *v.* DENE STEAM SHIPPING COMPANY **Channell J. 92**

4. —— *Seaman—Contract of Service for Ordinary Voyage—Carriage of Contraband—Termination of Voyage by Capture—Right to Wages—Damages—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 158.

A British seaman signed an agreement to serve on a British ship on an ordinary trading voyage to the East, and between ports in the East, to end at a final port of discharge in the United Kingdom. Whilst the ship was in the East war was declared between Russia and Japan, and the ship whilst carrying a cargo of contraband of war was captured by one of the belligerents and confiscated by a Prize Court. The master knew, but the crew did not know, that the ship was carrying contraband. The crew were sent back to London, and suffered hardships on the journey :—

Held, that, as the shipowners had broken the agreement by altering the character of the voyage, the service of the seaman was not terminated "by reason of the loss of the vessel" within the meaning of s. 158 of the Merchant Shipping Act, 1894, when the ship was captured, and that he was entitled to recover his wages up to the date of his arrival in London, and damages for breach of the agreement. AUSTIN FRIARS STEAM SHIPPING COMPANY *v.* STRACK. THE SAME *v.* STRACK - - - - **Div. Ct. 315**

5. —— *Ship—Vessel employed in coaling Ships of Navy—King's Ship—Pilotage Dues—Liability of Master—Merchant Shipping Act*, 1894 (57 & 58

SHIPPING—*continued.*

Vict. c. 60), ss. 591, 741—Bristol Channel Pilotage Act, 1861 (24 & 25 *Vict. c. cxxxvi.*), *s.* 35.

Sect. 741 of the Merchant Shipping Act, 1894, provides that the Act "shall not, except where specially provided, apply to ships belonging to Her Majesty."

A vessel owned by the Government and entered in the Navy List as employed on harbour service was exclusively employed under the Admiralty by the Devonport Dockyard authorities in carrying coal to ships of the Royal Navy. Her master held a Board of Trade certificate, and neither he nor the crew, who were engaged under articles of agreement, were in the navy. The master employed pilots, and proceedings were taken against him in a Court of summary jurisdiction under s. 591 of the Merchant Shipping Act, 1894, for the recovery of pilotage dues according to a scale imposed by by-laws made in pursuance of the Merchant Shipping Act, 1894, and a local Act (in which the Crown was not mentioned) under which the pilots were licensed:—

Held, that the vessel was a King's ship, and that the master was therefore not liable either under the Merchant Shipping Act or the local Act to pay pilotage dues on the scale imposed by the by-laws. SYMONS *v.* BAKER **Div. Ct. 723**

—— Insurable interest — Agents in United Kingdom of foreign ship—Advances for necessaries - - - - **555**
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—— Insurance, Marine.
See under INSURANCE, MARINE.

—— Workmen's compensation—Epileptic fit—Fall into hold of ship - - **225**
See EMPLOYER AND WORKMAN. 10.

SOLICITOR—*Unqualified Person—Acting as a Solicitor—Carrying on Proceeding in Action—Notice of Appearance to Writ—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 2—*Rules of Supreme Court, Order* XII., *r.* 9; *App. A, Pt. II., Form No.* 2.

An unqualified person who gives, as agent for the defendant in an action, the notice of appearance to the writ required by Order XII., r. 9, to be given by the defendant to the plaintiff or his solicitor, is thereby acting in contravention of s. 2 of the Solicitors Act, 1843, which prohibits any unqualified person from "acting as a solicitor" or "carrying on any proceeding" in the superior Courts. *In re* AINSWORTH. *Ex parte* THE LAW SOCIETY - - - **Div. Ct. 103**

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1815.

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1817.

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1827.

7 & 8 Geo. 4, c. 17—*Distress—Costs* - **108**
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5 & 6 Vict. c. 35, s. 60, No. IV., r. 10—*Income Tax* - - - - - **375**
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—— —— s. 102 - - - - **507**
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—— —— Scheds. C and D - - **413**
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5 & 6 Vict. c. 47, s. 59—*Customs* - - **586**
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1843.

6 & 7 Vict. c. 73, s. 2—*Solicitors* - - **103**
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8 & 9 Vict. c. 20, ss. 98, 99—*Railways Clauses*
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1849.

12 & 13 Vict. c. 14, s. 1—*Distress for Rates*
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1851.

14 & 15 Vict. c. 28—*Common Lodging-houses*
See LODGING-HOUSES. **691**

1852.

15 & 16 Vict. c. 85, s. 32—*Burial* - **565**
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